RECORD, CASE No. 14,736.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 542.

THE CITY OF NEW ORLEANS, APPELLANT,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY AND THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

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a UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana, at New Orleans.

THE TEXAS & PACIFIC RAILWAY COMPANY and The Fidelity Insurance, Trust and Safe Deposit Company, Appellees,
vs.
THE CITY OF NEW ORLEANS, Appellant.
} No. 11397. In Equity.

Howe & Prentiss, Esquires, solicitors for appellees; Francis B. Lee, Esq., ass't city attorney, solicitor for appellant.

Appeal returnable to the Supreme Court of the United States of America at the city of Washington, D. C., on the 24th day of July, A. D. 1891.

Transcript of Appeal.

1 Bill of complaint. Filed July 2, 1886.

To the judges of the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

The Texas and Pacific Railway Company, a corporation created by and under the laws of the United States, as hereinafter set forth, and having its domicile and principal offices in the States of Louisiana and Texas, and herein represented by John C. Brown and Lionel A. Sheldon, appointed receivers of said railway, as hereinafter set forth; and the Fidelity Insurance, Trust and Safe Deposit Company, a corporation created by and under the laws of Pennsylvania, and having its domicile in the city of Philadelphia, and joining herein as complainant for its interest as hereinafter set forth, bring this their bill against the City of New Orleans, a municipal corporation created by and under the laws of the State of Louisiana; and thereupon your orators complain and say:

First. That your orator, The Texas and Pacific Railway Company, is and has been since the year 1871, a corporation other than a banking corporation created by and organized under and by virtue of certain acts of Congress of the United States, to wit: 1st. "An act to incorporate the Texas and Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3d, 1871, being chapter 122 of Acts of 1871. 2d.

An act supplemental to the foregoing, approved May 2d,
2 1872, being chapter 132 of the Acts of Congress of 1872. 3d.

An act supplemental to said act of 1871, approved March 3d, 1873, being chapter 257 of the Acts of Congress of 1873. 4th. An act supplemental to said act of 1871, approved June 22d, 1874, being chapter 406 of the Acts of Congress of 1874.

That the Southern Pacific Railroad Company of Texas, created by acts of the legislature of that State of February 16th, 1852, and

August 16th, 1856, and the Southern Transcontinental Railway Company of Texas, created by acts of the legislature of that State of July 27th, 1870, were, prior to said 22d day of June, 1874, merged in and consolidated with said Texas and Pacific Railway Company; and your orator, the said Texas and Pacific Railway Company, acquired and now owns all the property, rights, powers, privileges and franchises of said Southern Pacific Railroad Company and said Southern Transcontinental Railway Company; and such acquisition, merger, consolidation and ownership were recognized, affirmed and approved by the said act of Congress of June 22d, 1874.

That thereafter and by deed dated June 20th, 1881, made by and between the New Orleans Pacific Railway Company, a corporation of Louisiana, created by and under the laws of Louisiana (being act No. 14 of 1876), party of the first part, and your orator, The Texas and Pacific Railway Company, party of the second part, your orator, The Texas and Pacific Railway Company, purchased and acquired the railway and appurtenant property of the said New Orleans Pacific Railway Company, and all its franchises pertaining to the said railway, including all its property

3 grants and privileges connected therewith in the city of New Orleans, and including those specially hereinafter described, arising from grants by the city of New Orleans; and the said New Orleans Pacific Railway Company, to the extent set forth in said deed (and reserving its corporate existence for certain purposes and as to certain other property), became merged in and consolidated itself with your orator, said Texas and Pacific Railway Company; and your said orator took possession of said railroad of the New Orleans Pacific Railway Company, in said city and elsewhere, and has completed and operated the same, and has held and possessed the same for more than four years last past, and now holds and possesses the same, pursuant to and in virtue of powers, rights and franchises conferred by the laws of the *the* United States; and the said Texas and Pacific Railway Company forms an important and comprehensive medium of interstate commerce.

Second. That on the 16th December, 1885, by proceedings duly had in this court in the cause entitled The Missouri Pacific Railway Company *vs.* The Texas and Pacific Railway Company, being No. 11181 of the docket, the said John C. Brown and Lionel A. Sheldon were duly appointed receivers of all the property, assets and rights of the said Texas and Pacific Railway Company, including the grants made by the city of New Orleans, as hereinafter set forth; and entered upon the control and management thereof, as by the order of said date in said cause will appear.

4 Third. That the city of New Orleans, then acting under its charter of 1870, through its council in the years 1880 and 1881 duly adopted the following ordinances, to wit: Ordinance No. 6695, administration series, adopted November 9, 1880; No. 6732, administration series, adopted December 3, 1880; and No. 6938, administration series, adopted March 29, 1881, granting to the New Orleans Pacific Railway Company and its assigns the rights therein

set forth; and copies of said ordinances are hereto annexed and made part of this bill as Exhibits "A," "B" and "C."

That, as appears by said ordinances themselves, the grants therein set forth and thereby made were made in the interest and for the benefit of said city, and to secure the fixing and establishment of the southern terminus of the railroad of the New Orleans Pacific Railway Company, its successor or assigns, within the city limits, to the great increase of the taxable values of said city and to her great benefit in the employment of her people and the increase of her commerce.

Fourth. That among other rights granted by said ordinances to said railway company and its assigns, and now specially referred to in this bill of complaint, were the following:

1. The right conferred by said ordinance No. 6695, A. S., to pass its tracks through Claiborne street, and to establish a passenger depot on Claiborne street, near Canal, involving the removal of the Claiborne market between Canal and Common streets, and to
5 connect the same with the river front through a street to be selected (Thalia street being afterwards duly selected).

2. A lease made by ordinance No. 6938 to the said railway company, its successor and assigns, for the period of ninety-nine years, at $500 per annum, of the strip or parcel of ground on the river front of the Upper City park, south of Tchoupitoulas street, or south of an extension of Tchoupitoulas street in a westwardly direction, and between a prolongation of the east and west boundary lines of said park to the river, with all the batture formed thereon, or which may form during the term of said lease, with the right to establish and maintain upon said ground such ferry facilities, wharves, piers, warehouses, yards, tracks, depots, stations, sheds, elevators and other structures as shall be necessary and convenient for the transfer of cars, engines, passengers and freight, and in the transaction of business; no vessel to occupy or lie at such wharves without the consent of said company, its successor or assigns, and all vessels lying at or using said wharves, with such consent, to be exempt from the payment of levee or wharf dues to the city of New Orleans; the proceeds of such lease to be applied by the city to the improvement of the park.

3. The right by the ordinance No. 6938, A. S., to extend its tracks from the said ground so leased, between the Upper City park and the river front, easterly along said river front to connect with the Belt road at Louisiana avenue, and to connect at Jackson street with tracks theretofore authorized to be constructed between Jack-
6 son and Julia streets by said ordinances No. 6695, A. S., and No. 6732, A. S.; the trains of the railroad, however, to be run only between sunset and sunrise on said track, except in case of emergency and necessity beyond the reasonable control of the company.

Fifth. Your orators further show that the grants so made were grants *in presenti*, and were duly accepted by the grantees, their successor and assigns, and said grantees and their successors and assigns, the Texas and Pacific Railway Company, have duly entered

into the possession and enjoyment of the same, as hereinafter set forth. That the only conditions of the grants detailed in the fourth paragraph of this bill are conditions subsequent, and are found in the fourth section of the ordinance of November 9th, 1880, and in the sixth section of the ordinance of March 29th, 1881, as follows:

"SEC. 4. Be it further ordained, etc., That the right of way, franchises and privileges, herein granted to the New Orleans Pacific Railway Company, are granted only on condition and in consideration that the said grantees shall permanently establish the terminus of said road within the city limits, and maintain said terminus during the existence of the charter of said company, for which period said right of way and privileges shall last; and should the said company, at any time hereafter, abandon its said road on the east side of the Mississippi river, and its terminus within the city limits, then this grant shall cease and terminate and be without force or effect, from the date of such abandonment; and the further
7 condition that all construction work, within the city limits, shall be executed under the direction and supervision of the city surveyor, and completed to the satisfaction of the administrator of improvements, and the administrator of commerce; and it is still further made a condition of this grant that said railway company shall complete its road from the crossing of the Mississippi river, at or near Baton Rouge, to its terminus in this city, within two years from the promulgation of this ordinance."

"SEC. 6. Be it further ordained, etc., That the right of way, franchises and privileges herein and heretofore granted to the New Orleans Pacific Railway Company are, and were granted on condition and in consideration, that the said grantees shall permanently establish its terminus within the city limits, and shall maintain said terminus during the existence of the charter of said company, for which period the said franchises, rights of way, grants and privileges shall last and continue, and should the said railway company, at any time hereafter, remove its terminus from within the city limits, then this grant shall cease and determine, and be without force and effect from the date of such removal; and the further condition that the construction work within the city limits shall be executed under the direction and supervision of the city surveyor, and completed to the satisfaction of the administrator of improvements, and the administrator of commerce; and the further condition that said railway company shall construct or control a line of road,
8 ready for public use, from a crossing of the Mississippi river, to its designated terminus in this city, within two years from the promulgation of this ordinance."

They aver that, within less than two years from November 9, 1880, and by March, 1882, the said grantees, and their said successor and assigns, at great expense, established their terminus in the city of New Orleans, where it has been at all times maintained, and acquired and constructed their lines of road, ready for public use, from the crossing of the Mississippi river at or near Baton Rouge to its terminus in New Orleans, as well as from Baton Rouge Junction to Shreveport; and constructed, at great outlay, a crossing

of the Mississippi river at Thalia street, and constructed and controlled necessary lines thence to their said designated terminus in New Orleans, ready for public use, and did the construction work, within the city limits, under the direction and supervision of the city surveyor, and completed the same to the satisfaction of the officers mentioned in said conditions; and in all respects complied with all said conditions, fully and fairly. And the said terminus, crossings, railway and connecting lines have been in use by the public since March, 1882. That said grantees have also, at great cost, acquired other property near said terminus, and on the river near the City park, in order to carry out the plan of terminals contemplated by the said ordinances and their grants.

That after said railroad and its crossings and terminus at New Orleans had been so completed and connected, the said city
9 fully recognized the fact, as will hereinafter appear. In view of laying tracks on Claiborne street, and establishing a passenger depot on the neutral ground of that street near Canal street, it became necessary to have the Claiborne market removed, and the matter having been duly investigated, the following ordinance, No. 7946 A. S., was duly adopted and promulgated, the recitals of which were a statement of well-known facts:

"An ordinance supplementary to ordinances 6695, 6732, and 6938, administration series, granting certain rights to the New Orleans Pacific Railway Company and its assigns and providing for the selection of a site for the Claiborne market.

"Whereas, by section two of ordinance 6695, administration series, a right was given to the New Orleans Pacific Railway Company or its assigns, to locate, construct and maintain an extension of its railroad through Claiborne street, with a right to construct a passenger depot on the neutral ground of Claiborne street, at or near the intersection of Claiborne street with Canal street; with a proviso that should it become necessary for the building of the depot or laying tracks to remove the Claiborne market, then the New Orleans Pacific Railway Company, or its assigns, should rebuild the same, at their own expense, on such lots as the city shall designate; and whereas, by ordinances Nos. 6732 and 6938, administration series, certain rights have also been granted to said company and its assigns with reference to the said Claiborne street and to Thalia street, and the company has built its road from Baton Rouge to New
10 Orleans crossing at Thalia street, and established its terminus in the city limits at Thalia street and the levee, and is preparing also to cross from Westwego to the City park and thence to Claiborne street, now, therefore:

"SECTION 1. Be it ordained by the council of the city of New Orleans, That the administrator of improvements, the administrator of commerce, and the administrator of water works and public buildings be, and they are hereby authorized and directed, within sixty days from the passage of this ordinance, to select such lots as may be needful and proper for a new site for said market; and when

such selection shall have been made, they shall deposit a procès verbal thereof in the office of the administrator of water works and public buildings.

"SEC. 2. Be it further ordained, That whenever said company or its assigns shall find it necessary to remove said building, it shall be rebuilt on said lots so selected, and as prescribed in said original ordinance.

"SEC. 3. Be it further ordained, That in crossing the new canal under its charter, and according to the said ordinances, the said railway company, or its assigns, shall do so by means of a proper drawbridge."

And your orators show that said ordinance was adopted, because it was a fact, and was well known, that tracks could not be laid, and a passenger depot could not be built, on the said neutral ground of Claiborne street, without removing said market-house.

That, after its passage, the said grantees, their said succes-
11 sors and assigns, constantly and often demanded the designation of lots, according to its terms, but the said officials delayed and neglected to perform that duty, and the city still remains in default in the premises.

They further show that the said grantees have paid the rent for two successive years on the lease of the park batture, above mentioned in the fourth paragraph of this bill, and have since tendered rent, which has been refused. And the city still retains the said sum of one thousand dollars in her treasury, and has never returned or offered to return it. That the said grantees have repeatedly demanded that the lines for the route granted them from Louisiana avenue to Jackson street should be given them by the proper authority of the city, and said lines have been wilfully and wrongfully refused. That said grantees have in all respects complied with their obligations under said grants, and are in nowise in default; and the said city has continually and wilfully been in default in the premises.

Sixth. And now your orators show that the said city of New Orleans, as organized under her charter of 1882, has unlawfully attempted to repeal, ignore and destroy the rights vested in said grantees and their said assigns by the said ordinances, as set forth in the fourth paragraph of this bill, and to impair and violate the contracts created by said ordinances, and by their acceptance and use.

Her common council have passed, and her acting mayor, in
12 the absence of her mayor, has approved and promulgated, against the protest of said grantees, a certain ordinance No. 1828, council series, in the words and figures following, to wit:

MAYORALTY OF NEW ORLEANS,
CITY HALL, *June* 16, 1886.

No. 1828, Council series.

An ordinance repealing certain rights granted to the New Orleans Pacific Railway Company under ordinance No. 6695, A. S., adopted November 9, 1880; No. 6732, A. S., adopted December 3, 1880; No. 6938, adopted March 29, 1881; No. 7946, adopted July 11, 1882; and

Whereas, the city of New Orleans granted to the Pacific Railway Company the right to extend its tracks through Claiborne street to Canal, to erect a passenger depot on Claiborne street near Canal street, construct tracks from Claiborne street to and through Tonalia street to the river; and

Whereas, the original grantee company has merged its identity with that of an alien corporation which itself is now in the hands of a receiver appointed on the prayer of an alien corporation; and

Whereas, such rights were granted on various conditions which have not been complied with, and the delay for so doing has elapsed; and

Whereas, by the acts of said New Orleans Pacific Railway Company, such rights have been abandoned, and it is necessary for the public good that Claiborne street, between Common street and the old basin, shall be used for steam and horse railway and depot purposes:

13 Therefore, be it ordained by the council of the city of New Orleans, that all rights of way on Claiborne street, rights to establish a passenger depot on said street, and rights to connect any steam or other railway by the New Orleans Pacific Railway Company through or on Claiborne street, or to erect any depot thereon, whether acquired through or by the ordinances above enumerated, or through or by any other ordinance of the council of the city of New Orleans, be and the same are hereby repealed and revoked.

Adopted by the council of the city of New Orleans, June 8, 1886.

W. H. MICHEL,
Assistant Clerk of Council.

Approved June 16, 1886.

D. M. KILPATRICK,
Mayor pro Tem.

Your orators aver that the preamble of said ordinance is not only highly improper in language and allusion, and shows a malicious and reckless spirit, but it is untrue in fact, in every important particular, so far as it alleges any default or abandonment by said grantees or their assigns. For your orators repeat, in this behalf, the allegations hereinbefore made in the fifth paragraph of this bill. They especially deny that the said grantees have not complied with the conditions of said grant, and aver that they have so complied. They deny that the said grantees are in any respect in default in the premises; and aver that the said city is herself in default; and

that said repealing ordinance is illegal and injurious, and
14 should be so declared and cancelled and annulled by proper decree of this court.

They further aver, that on or about the 24th day of April, 1884, against the protest of the said grantees, the common council of the said city adopted and the mayor approved and promulgated the ordinance No. 685, C. S., whereby the attempt is made to repeal or revoke the said lease of the park batture, set forth in the second subdivision of the fourth paragraph of this bill, which ordinance No. 685 is as follows:

"An ordinance repealing certain sections of the ordinance No. 6938, A. S., granting privileges to the New Orleans Pacific Railway Company.

"Be it ordained, That section two (2) of the ordinance No. 6938, A. S., passed March, 1881, granting to the New Orleans Pacific Railway Company a lease of the Upper City Park batture property, be and the same hereby is repealed and revoked."

They aver that said ordinance No. 685 is illegal and injurious, and should be so declared, and should be cancelled and annulled by proper decree of this court.

Seventh. Your orators further show, that by acts of mortgage and supplemental mortgage, dated respectively July 31, 1880, and July 1, 1884, and duly recorded, the railroad of the New Orleans Pacific Railway Company, and its appurtenances and rights and franchises pertaining to said railroad, were mortgaged to said Fidelity Insurance, Trust and Safe Deposit Company, to secure bonds to the amount of $7,100,000, of which $6,720,000 are now outstanding; and by a second mortgage, dated August 1, 1884, and duly
15 recorded, the whole railroad of the Texas and Pacific railway, with its appurtenances and rights and franchises pertaining thereto, and also the said terminal properties in New Orleans and other property, were mortgaged to the said Fidelity Insurance, Trust and Safe Deposit Company, to secure an issue of bonds, of which about $2,624,000 have been issued; this mortgage being a first lien upon said terminal properties, and a general lien on all the railroad property subject to said prior mortgages by the New Orleans Pacific Railway Company and other incumbrances.

And your orator, the said Fidelity Insurance, Trust and Safe Deposit Company, has a large and lawful interest to join herein as complainant and assert the illegality of said ordinances Nos. 685 and 1828, council series, and to ask that they be cancelled and annulled.

Eighth. Your orators aver that it is now desired, and it is of great importance that the Texas and Pacific Railway Company should avail itself of the rights set forth in the fourth paragraph of this bill; and which belong to it as successor and assign of the New Orleans Pacific Railway Company; but they aver that said ordinances Nos. 685 and 1828 cast a cloud upon the title of the said railway company, grantees, and the said trust company as mort-

gagees in the premises, and constantly menace and imperil their possession, use and enjoyment of said grants, and threaten a great depreciation of their value, and stand in the way of all
16 attempts to improve the terminal facilities of said Texas and Pacific railway in New Orleans, and to carry out the plans which have been formed on the faith of said grants, and work irreparable injury to the property acquired in view of said grants. And your orators have reason to fear, and do fear that, unless restrained by orders of this court, the said city will proceed to further impair and injure the rights of your orators, by executing said ordinances Nos. 685 and 1828; by interfering with the said railway in its rights to lay its tracks and erect its depot on Claiborne street; by interfering with its right to use the said park batture; by withholding the lines which its officers should give along the river front from Louisiana avenue to Jackson street; and by undertaking to grant to others the rights which belong to the Texas and Pacific Railway Company in the premises; and this to the great and irreparable injury of your orators.

To the end, therefore, that your orators may have that relief which they can only obtain in a court of equity, and that the city of New Orleans may answer the premises (but not under oath or affirmation, the benefit of which is waived), and that the said ordinance of the city of New Orleans, No. 685, and the said ordinance No. 1828, council series, may be adjudged and decreed to be illegal and injurious to complainants, and may be cancelled, and that the right of the Texas and Pacific Railway Company, under the ordinance No. 6695, administration series, to lay its tracks and build a passenger depot on the neutral ground of Claiborne street,
17 near Canal street, and to remove the Claiborne market, be declared and decreed; and its right to the lease of the said park batture, under the second section of the ordinance No. 6938, administration series, be declared and decreed; and its right to have lines furnished by the proper official of the city for its route from Louisiana avenue to Jackson street, along the river front, under the third section of said ordinance, be also declared, decreed and specifically enforced; and that the said city of New Orleans, its officers and agents, may be enjoined and restrained from in anywise executing said ordinances Nos. 685 and 1828, council series, and from granting to any other person or corporation the rights sought to be taken away by said ordinances Nos. 685 and 1828, C. S., and that such other or further decree may be made as may be just.

May it please your honors to grant unto your orators a writ of subpœna addressed to the city of New Orleans through its mayor, commanding it to appear at a certain time and under a certain penalty, before your honorable court, and full, true and perfect answer make to all the premises, and to stand to, perform and abide such further order, direction and decree, as to this court shall seem meet, and for costs and general relief.

KENNARD, HOWE & PRENTISS,
Solicitors for Complainants.

W. W. HOWE, *Of Counsel.*

U. S. OF AMERICA,
State of Louisiana, Parish of Orleans, } *ss:*

18 Edward B. Wheelock, of New Orleans, being duly sworn, says that he is general agent in New Orleans for the receivers of the Texas & Pacific Railway Company and for said company, and has personal knowledge of the matters set forth in the foregoing bill, which he has read; that the said bill is true of his own knowledge except as to matters therein stated on information and belief, and as to those matters he believes it to be true.

(Signed) E. B. WHEELOCK.

Sworn to and subscribed before me, in my office, No. 162 Common street, New Orleans, Louisiana, this 2d day of July, 1886.

(Signed) MICHEL V. DEJAN, *Not. Pub.*

19 *Rule for Injunction. Entered and Filed July* 9, 1886.

THE TEXAS & PACIFIC RAILWAY COMPANY, &c.,
vs.
THE CITY OF NEW ORLEANS. } No. 11397.

On motion of Kennard, Howe & Prentiss, solicitors for complainants, and suggesting the allegations of the bill filed herein—

It is ordered that the defendant, The City of New Orleans, show cause before this court on Saturday, the 6th day of November, 1886, at 11 a. m., why an injunction should not issue herein (*pendente lite*), as prayed for in the bill, enjoining and restraining the city of New Orleans, her officers, agents, and servants, from executing the ordinances No. 685 and No. 1828, council series, and from interfering in any way with the Texas & Pacific Railway Company, its officers, receivers, and agents, in the exercise of the rights granted by ordinances No. 6695, 6732, and 6938, as detailed in paragraph four of the bill of complaint, or why such other or further order should not be made in the premises as may be just.

July 6th, 1886.

(Signed) DON A. PARDEE,
Circuit Judge.

Appearance of Defendant.

Extract from Chancery Order Book.

MONDAY, *August* 2, 1886.

TEXAS & PACIFIC R. R. Co.
v.
CITY OF NEW ORLEANS. } No. 11397.

20 And now comes the defendant, The City of New Orleans, by W. H. Rogers, city attorney, its solicitor, and enters its appearance to the complainant's bill of complaint herein.

Answer. Filed November 1st, 1886.

TEXAS & PACIFIC RAILWAY CO.
vs.
CITY OF NEW ORLEANS. } No. 11397. In Chancery.

This defendant, now and at all times hereafter, saving and reserving unto herself all and all manner of benefit and advantage by exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in said complainant's bill of complaint contained, for answer thereunto or unto so much and such parts thereof as this defendant is advised is or are material or necessary for her to make answer unto, this defendant, answering, says—

Your defendant admits that said Texas and Pacific Railway Company was organized in accordance with an act of Congress approved March 3rd, 1871, May 2nd, 1872, March 3rd, 1873, and June 27th, 1874, as alleged by complainants.

That the Southern Pacific Railroad Company of Texas was created by acts of the legislature of that State of February 16th, 1882, and August 16th, 1856, and that the Southern Transcontinental Rail-
road Company of Texas was created by acts of the legisla-
21 ture of that State of July 27th, 1870, and, as far as your de-
fendant is informed, consolidated and merged by act of Congress of June 22nd, 1874, as alleged by complainants.

Your defendant admits that the New Orleans Pacific Railway Company was created by an act of the legislature of Louisiana, act No. 14 of 1876, and your defendant is advised that by some article in writing, deed, or otherwise on or about the 20th of June, 1881, a contract was entered into between the New Orleans Pacific Railway Company and the Texas and Pacific Railway Company; that said act or deed, as far as your respondent is informed, is not of public record in the city of New Orleans and has not up to this time been accessible to this defendant, but this defendant believes that same was executed and carried into effect by agreement made in a parish other than the city of New Orleans.

Your defendant avers that the said merger, as alleged by complainant, in the said deed did consolidate the New Orleans Pacific Railway Company and the said Texas and Pacific Railway Company; that the effect of same was to hold and bind the said Texas and Pacific Railway Company to all the conditions, charges, and obligations imposed upon the said New Orleans Pacific Railway Company, and gave to said Texas and Pacific Railway Company no greater rights, no greater privileges, and in no manner effected the equities and obligations between the said New Orleans Pacific Railroad Company and this defendant.

Your defendant admits that on the 16th of December, 1885, by proceedings duly had in this honorable court, cause No. 11181, John C. Brown and Lionel A. Sheldon were duly appointed
22 receivers of the said Texas and Pacific Railroad Company;

that your defendant answers and says she does not know and cannot set forth as to her belief or otherwise whether the said receivers or either of them were at any time seized or possessed of any right or title to the property, assets, and rights of said Texas and Pacific Railway Company; on the contrary, that said Texas and Pacific Railway Company, as representing the New Orleans Pacific Railway Company in so far as the rights, franchises, and grants are concerned, is still in existence, and that said John C. Brown and Lionel L. Sheldon are merely receivers or administrators for the purposes of carrying on and liquidating and performing such duties and such powers, purely ministerial in their characters, which pertain to the said corporation still existing and the charter of which has never been annulled.

Further answering, your respondent says that the city council of the city of New Orleans did adopt ordinance 6695 on the 9th of November, 1880; No. 6732, December 3rd, 1880; No. 6938, March 29th, 1880, as set forth in the said bill of complaint, as appears from Exhibits "A," "B," and "C." Respondent further says that the said ordinances to which complainant refers and makes part of his bill set forth clearly and distinctly what interests and what benefits were to result to the parties thereto; that said ordinances are clear and void of ambiguity and are alone to be considered in fixing or determining the causes or reasons for which same were enacted.

It is true, as alleged, that the right was conferred by said ordinance 6695 to the New Orleans Pacific Railway Company to pass its tracks through Claiborne street, to establish a passenger
23 depot on Claiborne street near Canal, involving the removal of the Claiborne market, and to connect same with the river front through a street to be selected.

Your defendant denies that the grants referred to, contained in said ordinance 6695, were grants *in presenti*, or that they were so accepted or received by said complainant, or that it at any time entered into possession and enjoyment of same, but, on the contrary, that said grants could only take place and be of effect upon the performance of certain conditions precedent which were absolute and mandatory, and that a failure to perform the same not only virtually forfeited all rights in said complainant or said railway company which they presume to represent, but, by the failure to perform the same, became of no effect.

That by the terms of said ordinance 6695, as will appear from the same, such rights and grants were conditioned upon the performance of certain obligations by the said complainant railroad company, and which conditions have never been performed, although the delays and the time allowed them, the said Co., have long since elapsed; and your defendant avers and can show that it never was the intention or the purpose of said complainants and their said railroad corporations ever to comply with the conditions of said ordinance.

Your defendant avers that the said railroad company has actually abandoned its said road on the east side of the Mississippi river and its terminus within the city limits.

That the said railway company has failed to complete its crossing of the Mississippi river at or near Baton Rouge and it has abandoned the same; that it has never performed and constructed work within the city limits, as required by said ordinances and
24 directed by the city surveyor; on the contrary, the city of New Orleans has been compelled to do and perform work in the saving of certain streets with square blocks, which was agreed to be done by said railway company, the city paying therefor over the sum of fourteen thousand dollars, and which large amount the said company has refused and neglected to pay, although frequently demanded so to do; that in all other directions said company has failed to perform its obligations; that it obligated itself to permanently establish its terminus within the city limits and to maintain same during its existence and has failed so to do; that it has failed to construct or control a line of road ready for public use from the crossing of the Mississippi river to a designated terminus, and that the two years, as required by said ordinance made part of complainants' bill, have long since expired.

That the said complainants have not designated or selected lots or sites for the removal of the said Claiborne market, nor have they at any time tendered or offered same to the city of New Orleans. This defendant says that said complainants have not complied with their obligations under said grants, but, on the contrary, have wilfully failed in the performance of same either in whole or in part, and that said company has continually and wilfully been in default in the premises.

Your respondent further says that upon representation and persistent demands from said complainant railroad company she, the respondent, did, by ordinance No. 6938, grant a lease of the batture in front of the Upper City park, in this city, for a period of ninety-nine years at five hundred dollars per annum; that said act of the city council was *ultra vires*, in excess of its corporate powers, and was without any effect whatsoever. The city of New Orleans exercises its power only by delegation of authority from the State
25 and the right to make any such lease was specially refused and denied by the legislature, all of which was well known to said complainants and the railroad companies which they now represent; that said property consisted of the river bank of the Mississippi river, in which the city council had no right or property and in which she was prohibited by law in reducing it directly or indirectly to private ownership or private interest, and that a subsequent administration of the city of New Orleans, recognizing said illegal and improper act as being beyond their power, did, by an act which purports to repeal the same, declare the illegality and impropriety of said enactment of their predecessors, and to conform to the requirements of the law publicly declared the same to be annulled, all of which was right and proper in the premises and should be sustained by this honorable court.

That said Claiborne street, through which it was purposed to pass a railroad track and erect a depot near Canal street, on what is known as the neutral ground, a space of ground dividing said Clai-

borne street, and which had been dedicated to the public use; that same had been planted with trees and arranged for matters of public necessity for the health and salubrity of this city; that the original act granting right of way through said premises was *ultra vires*, null and void—

In addition to the fact that said railroad company had abandoned their project of building an union depot and had not attempted within the time claimed to exercise under the ordinances through which they claim their grants to erect said depot or to make arrangements or preparations for same. On the contrary, this defendant now alleges the consolidation of said New Orleans Pacific Railway Company with the Southern Pacific Railway Company and
26 the Texas and Pacific Railway Company was for purposes antagonistical to the interest and prosperity of this city; that by this arrangement was effected a combination of three distinct railway organizations and communications in the interest of the lines and corporations antagonistic to that portion represented by the New Orleans Pacific Railway Company.

That it was never the purpose of the present complainant company to carry out any of the provisions or conditions of the grant, but it wilfully neglected to in any manner prepare, construct, or even keep the said road in running condition; that it was not the interest of said corporation so to do, that its interest being centered in that portion connected with railroads from other States, and which your opponent is informed and believes to be known as the Central division of the Texas and Pacific Railway Company, all of which will appear by the report of the master, who, under the direction of this honorable court, instituted inquiry and made report of the condition of the said Texas and Pacific Railway Company, and on file in suit No. 11181 of the docket of this court, to which reference is made in the second article of said bill of complaint.

Your defendant here declares and recites that all her acts in the premises, in which she declared the abandonment on the part of the railway company and forfeiture by it of all grants as to the rent of the bature and the neutral ground on Claiborne street, have been justified not only by the law applicable to such conditions or grants, but also by the acts and doings of the said railroad company, their agents and assigns.

Your defendant says that she denies that any mortgage or supplemental — has been granted to the Fidelity Insurance,
27 Trust and Safe Deposit Company, or that any evidence of any indebtedness has been issued to said Fidelity Insurance, Trust and Safe Deposit Company by the New Orleans Pacific Railway Company which gives a right or mortgage upon any of the franchises, appurtenances, or rights of said railroad company, or in fact or in reality any such exist, either to the amount mentioned in said bill of complaint or to any amount whatsoever; and your defendant therefore denies that said Fidelity Insurance, Trust and Safe Deposit Company has any interest in this controversy whatsoever, nor have they any rights as complainants in and to the said

ordinances, nor can they be heard to set up any objections to the same.

Your defendant denies that it is the intention of said Texas and Pacific Railway Company, their receivers or assigns, to avail themselves of the privileges of any of these grants as set up by them, nor had they at any time any such purpose. On the contrary, the said company, by its own allegations and the proceedings provoked in this honorable court, resulting in the appointing of the receiver, shows conclusively lack of ability or intent on the part of said company to comply with the provisions or conditions of the grant.

This defendant denies all and all manner of unlawful combination or confederacy wherewith she is by said bill charged; that without this, there is no other matter, cause, or thing in said complainants' bill contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied *that* is true to the knowledge or belief of this defendant; all of which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays
28 to be hence dismissed with its reasonable costs and charges in this behalf sustained.

(Signed) W. H. ROGERS,
City Att'y, Solicitor for Def't.

Replication. Filed Nov'r 20, 1886.

THE TEXAS AND PACIFIC R'Y CO., Through its Receivers, and THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY
vs.
THE CITY OF NEW ORLEANS.

No. 11397. In Equity.

Replications of the complainants to the answer of defendant.

These repliants, saving and reserving unto themselves now and at all times hereafter all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto say that they will aver, maintain, and prove their said bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by these repliants;

Without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be
29 replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true.

All which matters and things these repliants are and will be ready to aver, maintain, and prove as this honorable court shall

direct, and humbly pray as in and by their said bill they have already prayed.

(Signed) KENNARD, HOWE & PRENTISS,
Solicitors for Complainant.

(Signed) W. W. HOWE, *Of Counsel.*

Supplemental Bill. Filed Febr'y 3rd, 1887.

THE TEXAS & PACIFIC RAILWAY COMPANY *et al.* } No. 11397.
vs. } In Equity.
THE CITY OF NEW ORLEANS.

To the judges of the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

The complainants in this cause bring this their supplemental bill against the defendant with leave of the court, and thereupon further complain and say:

First. That, under the rights granted, accepted, and acquired by and under the ordinances set forth in the original bill of complaint herein, the wharf of the Texas & Pacific railway, above its transfer incline between Thalia and Terpsichore streets, on the Mississippi river, in New Orleans, has been duly constructed and used for about five years, in conformity with the conditions and provisions of said ordinances; and in like manner and during the same time the tracks of said railway connecting its transfer facilities and its depots and sheds at its Thalia-street terminus have been laid and used in Pilie and Water streets and along the river front from Thalia street up to about Race street, according to the conditions and requirements of said ordinances; that within the last month it has become necessary for the business of said railway, and especially in the proper handling of the grain trade of the city, to lay a small spur track to connect said wharf above the transfer slip with the said tracks on Pilie and Water streets, as shown by a plan thereof herewith filed as part hereof and marked "P," and to drive some piling to reach said wharf.

Second. That the railway company, through its said receivers, has duly applied to the city surveyor for the lines and levels of said spur, to the end that there should be no complaint on that score—though your orators show that there was no practical necessity for lines and levels for such a small work—and said surveyor admitted that said work was (as your orators aver it to be) authorized by and included in said ordinances, and that the lines ought to be given, but declined to give them solely on the ground that he was forbidden to do so by a certain general resolution of the council, of Sept. 15th, 1885, prohibiting him from giving any lines for such work in the street without submitting the question to the council. He has submitted the request of the railway to said council and it has not yet been acted on, but has been unlawfully delayed. Your orators aver that the said resolution of Sept. 15, 1885, as thus applied to limit and infringe the rights conferred by said ordinances, is illegal

and a gross breach of contract; and they further show that,
31 upon the theory that some further action by and permission from the council is needful before the railway should be allowed to lay said spur, the mayor of said city has stationed a policeman to prevent the railway from doing any work in connection with said improvement, and which policeman still remains there; which act upon his part is unlawful and injurious, and works irreparable injury and causes great delay where no delay is admissible.

And your orators reiterate the allegations and prayer of their original bill.

To the end, therefore, that justice may be administered in the premises according to the rules of equity;

And that the relief hereinbefore prayed for may be granted and the rights of the Texas & Pacific Railway Company under said ordinances 6696, 6732, 6938, and 7946, A. S., may be recognized and enforced;

And that the city of New Orleans, its mayor and other officers and its agents and servants, may be enjoined and restrained from interfering with the receivers of the Texas & Pacific railway in their work of building the said spur to connect the wharf above the transfer incline, between Thalia and Terpsichore streets, with the tracks of the railway in Pilie and Water streets and along the river front as shown on said plan "P," and in the work of strengthening and filling up said wharf and driving piling to reach the same with said spur, and from interfering in any manner with the exercise by the Texas & Pacific railway and its receivers of the right set forth in said ordinances, and that said injunction may be made perpetual, and that a restraining order may issue to the same effect meantime, and that such other and further order and decree may be made as may be just—

32 May it please your honors to grant to your *honors* a writ of subpœna addressed to the city of New Orleans through its mayor, commanding it to answer this supplemental bill (but not under oath) and to abide the decree herein; and your orators pray for general relief.

(Signed) W. W. HOWE, *Of Counsel.*

U. S. OF AMERICA, *ss:*

Lionel A. Sheldon, being duly sworn, says that he is one of the receivers of the Texas & Pacific railway and has read the foregoing supplemental bill, and that the same is true of his own knowledge except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

(Signed) LIONEL A. SHELDON.

Subscribed and sworn before me February 3, 1887.

(Signed) E. R. HUNT,
Commissioner United States Circuit Court,
Eastern District of Louisiana.

Order.

Let this supplemental bill be filed and let the defendant show cause on the 19 February, 1887, at 11 a. m., why an injunction should not issue herein *pendente lite* as prayed for in the bill and supplemental bill; and in the meantime and until the hearing and decision of the said motion let the defendant be restrained as prayed for in the bill of complaint and supplemental bill herein,
33 and let a restraining order to that effect be issued.

Feb'y 3, 1887.

(Signed) EDWARD C. BILLINGS, *Judge.*

Plan, marked "P," filed with supplemental bill. See page 125 of this transcript.

Restraining Order. Issued Feb'y 3, 1887.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Judicial Circuit and Eastern District of Louisiana.

THE TEXAS & PACIFIC RAILWAY COMPANY *et al.* *vs.* THE CITY OF NEW ORLEANS. } No. 11397.

The President of the United States to the city of New Orleans and to Joseph V. Guillotte, its mayor, Greeting:

Whereas it has been represented unto us, in our said circuit court, on the part of The Texas & Pacific Railway Company, through its receivers, and The Fidelity Insurance, Trust and Safe Deposit Company, complainants in the original and supplemental bills in equity lately exhibited against you touching certain matters and things therein set forth; and whereas the Honorable Edward C. Billings, one of the judges of our said court, upon due consideration thereof, has made and allowed an order in said cause whereby you are required to show cause, on the 19th day of February, 1887, why
34 an injunction should not issue as prayed for in said bills of complaint; and whereas the said judge has granted and allowed an order restraining you immediately and forthwith and during the pendency of said motion for an injunction to the full extent and effect as prayed for in said bill of complaint and supplemental bill:

Now, therefore, in consideration of the premises and of the allegations in said bill contained, you, the said City of New Orleans, your officers, agents, and servants, and you, Joseph V. Guillotte, mayor of said city, your agents, attorneys, and servants, and each of you are hereby commanded and strictly enjoined, under the penalty of the law, that you and each of you absolutely refrain and desist from interfering with the said Texas & Pacific Railway Com-

pany or with the receivers of said railway in the exercise of any of the rights granted to the New Orleans Pacific Railway Company and its assigns, the said Texas & Pacific Railway Company, by ordinances set forth in the bill herein, Nos. 6695, 6732, 6938, and 7946, ad. series, copies of which are filed herein, and from executing the ordinances No. 685 and 1828, council series, and from granting to any other person or corporation the rights attempted to be taken away or impaired by said ordinances 685 and 1828, C. S., and from interfering in any way, whether by the use of policemen or otherwise, with the said Texas & Pacific railway or its receivers in the work of building a spur track to connect their wharf above the transfer incline, between Thalia and Terpsichore streets, with the tracks of said railway as now laid in Pilié and Water streets and along the river front as delineated on the Exhibit "P" filed herein as part of the supplemental bill, and from interfering in anywise with
35 the work of driving piles so as to reach said wharf of the railway with said spur track, whether by policemen or otherwise, and from in anywise hindering or delaying any work provided for in the said ordinances Nos. 6695, 6732, 6938, and 7946, administration series.

And that you, the said city of New Orleans, your officers, agents, attorneys, and servants, and you, said mayor, your agents, attorneys, and servants, and each of you, remain so inhibited and restrained until the further order of our said court in the premises.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 3rd day of February, in the year of our Lord one thousand eight hundred and eighty-seven.

[L. S.] (Signed) E. R. HUNT, *Clerk.*

Marshal's Return.

Rec'd Feb'y 3rd, 1887, and on the same day, month, and year I served a true copy of within restraining order as follows: On the city of New Orleans by handing the same to the Hon. J. V. Guillotte in person, whom I know to be mayor of said city, at his office at the city hall, in the city of New Orleans, La.

(Signed) R. B. PLEASANTS,
U. S. Marshal,
By D. J. DELANY,
D'y Marshal.

On the 3d Feb'y, 1887, I served a true copy of within restraining order on the superintendent of police of the city of New Orleans by handing same to Lucien Adams in person, whom I know to
36 be the superintendent of police of said city of New Orleans, and leaving same in his hands.

(Signed) R. B. PLEASANTS, *U. S. M'l,*
By JNO. E. LIVAUDAIS, *D'y.*

Order: Motion for Injunction Fixed for Hearing, &c. Entered and Filed 3 Feb'y, 1887.

THE TEXAS & PACIFIC RAILWAY COMPANY *et al.*
vs.
THE CITY OF NEW ORLEANS. } No. 11397.

On motion of W. W. Howe, of counsel for the complainants, it is ordered that the motion for an injunction heretofore filed herein be set down for the 19 Feb'y, 1887, at 11 a. m.; and, further, that defendant show cause on that day and at that hour why an injunction should not issue herein *pendente lite* as prayed for in the original and supplemental bills, or why such other or further order should not be made as may be just.

Order: Restraining Order to Stand as an Injunction Pending Suit.

Extract from the Minute Book, November Term, 1886.

NEW ORLEANS, TUESDAY, *April* 5, 1887.

37 Court met pursuant to adjournment.
Present: Hon. Don A. Pardee, circuit judge.

TEXAS AND PACIFIC RAILWAY COMPANY
vs.
CITY OF NEW ORLEANS. } No. 11397.

This cause came on to be heard at this term on the complainant's application for an injunction *pendente lite* herein and was argued by counsel. On consideration whereof it is now ordered that the restraining order heretofore issued hereon on the 3rd day of February, A. D. 1887, do stand as an injunction pending suit.

Order to Strike Out Names of Receivers. Entered and Filed February 24, 1891.

THE TEXAS & PACIFIC RAILWAY COMPANY *et al.*
vs
THE CITY OF NEW ORLEANS. } No. 11397.

On motion of Howe & Prentiss, of counsel for complainants, and suggesting that the receivership of the property of the Texas & Pacific Railway Company was terminated on the 30 October, 1888, and the property restored to the said company, as by orders made in said receivership cause will appear:

It is ordered that the names of the said receivers, John C. Brown and Lionel A. Sheldon, be stricken from the record and that the cause proceed in the name and behalf of the complainants, to wit,

38 The Texas & Pacific Railway Company and The Fidelity Insurance, Trust and Safe Deposit Company.

February 24, 1891.
(Signed) EDWARD C. BILLINGS, *Judge.*

No objection.
(Signed) FRANCIS B. LEE,
Solicitor of Defendant.

Order Dismissing without Prejudice the 2nd Supplemental Bill. Entered and Filed Feb'y 24, 1891.

THE TEXAS & PACIFIC RAILWAY COMPANY, &c., *vs.* THE CITY OF NEW ORLEANS. } No. 11397.

On motion of Howe & Prentiss, of counsel for complainants, and suggesting that in order to facilitate for all parties the investigation of the main issues in this cause they are willing to dismiss the second supplemental bill filed herein — ——, 1889, but without prejudice to any right therein claimed:

It is ordered that said second supplemental bill be withdrawn and dismissed, but this without any prejudice to any right therein set up by complainants.

Feb'y 24, 1891.
(Signed) EDWARD C. BILLINGS, *Judge.*

No objection to above order.
(Signed) FRANCIS B. LEE,
Solicitor of Defendant.

39 *Hearing, Notes of Evidence, and Submission.*

Extract from the Minute Book, November Term, 1890.

NEW ORLEANS, TUESDAY, *February* 24, 1891.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

TEXAS & PACIFIC RAILWAY CO. & *al.* *vs.* THE CITY OF NEW ORLEANS. } No. 11397.

This cause came on this day to be heard on the bills of complaint, answers, replication, exhibits, evidence, and testimony—present, W. W. Howe, solicitor for the complainants; F. B. Lee, ass't city attorney, for defendant—whereupon the following evidence was offered on behalf of complainants, viz:

1. Testimony of W. W. Howe and Edward B. Wheelock, taken before Special Examiner Hyman February 12th and 16th, 1887, and of Charles Cavanac, taken before said examiner Feb'y 16, 1887,

and all the statutes, ordinances, papers, books, maps, and documents therein offered for complainants, marked E. B. W. 1.

2. Charters of New Orleans Pacific Railway Company, being acts No. 14 of 1876 and No. 12 of 1878, marked "charter A;" articles of consolidation of the New Orleans Pacific Railway Company with the Texas & Pacific Railway Company of June 20, 1881, as recorded and filed in the office of secretary of state of the State of Louisiana June 28, 1881, marked "articles 13."

40 Ordinances of the city of New Orleans in question herein, Nos. 6695, 6732, 6938, 7946, administration series, and also (to show the fact of their adoption as complained of) ordinances 685 and 1828, council series, marked "pamphlet one."

The foregoing acts, consolidation articles and ordinances being printed in the pamphlet marked "pamphlet one, Dec., 1890," the said pamphlet is offered and received in evidence with same effect as if the originals therein printed had been produced, offered, introduced, and filed — "pamphlet one."

It is agreed that any acts of Congress or of the legislatures of Texas or Louisiana referred to in the pleadings and testimony shall be considered in evidence as if specially offered and filed and may be referred to in printed statutes or in the above pamphlet or in the one now offered and introduced, marked pamphlet two, Dec., 1890.

3. Complainants offer, introduce, and file copies of mortgage referred to in bill of complaint made by the New Orleans Pacific Railway Company to the co-complainant, The Fidelity Insurance, Trust and Safe Deposit Company, dated —— —, and also the mortgage made to same trust company by the complainant, The Texas & Pacific Railway Company, which it is agreed may be put in with the same effect as if it had been set up by amended and supplemental bill, marked "trust Co. one," "trust Co. two."

4. Complainants offer and introduce testimony of Edward B. Wheelock and Robert Strong, taken by consent on Jan. 7,

41 1891, marked E. B. W. "2;" R. S. "1," and in connection therewith a sketch of the batture in front of the Upper City park, to be marked "batture 1."

Also certificate of recorder of conveyances showing title of park commissioners to the Upper City park, now called Audobon park, to be marked "batture 2."

Also copy — petition, supplemental petition, and citation in case of City of New Orleans *vs.* New Orleans Pacific Railway Company, No. 14619, civil district court, parish of Orleans, which is admitted to be still pending in said State court, and marked 14619.

It is agreed that all acts of the legislature of Louisiana in respect to the said park and park commission shall be considered in evidence and referred to in session laws, and need not be copied in the record.

And defendant offered its evidence, as follows:

1. The testimony of B. M. Harrod and of D. M. Brosnan, taken on the 11th day of October, 1889, before T. Wharton Collens, notary public, and all the papers, documents, records, maps, drawings, and

books offered in evidence in connection with the said testimony. The testimony is marked "R. No. 11."

2. A certified extract from a plan by the late Joseph Pilié, referred to in said testimony, marked Exhibit "R. No. 1."

3. A certificate of A. J. Villeré, register of conveyances, dated 7th of October, 1889, showing various sales of property shown on the Pilie map, marked "R. No. 2."

4. Act No. 7 of the extra session of the legislature of the State of Louisiana of the year 1870, being the charter of the city of New Orleans in force up to the year 1882; also act No. 48 of 1871,
42 amending said act of 1870. It is agreed that these acts shall be considered in evidence and be referred to in the session laws, and that they need not be copied into the record in case of an appeal.

5. The original bill for a receiver in the proceedings No. 11181 of the docket of this court, entitled Missouri Pacific Railway Co. *vs.* The Texas Pacific Railway Co., the answer to the said bill, and the report of the master in that case as to the condition of the Texas Pacific Railway Co., marked "R. No. 2*a*." "R. No. 2*b*," "R. No. 2*c*."

6. Copy of a part of the Belt Road ordinance, being No. 6166, A. S. (page 412 of Jewell's Digest of 1882), marked "R. No. 3."

7. The entire record in proceedings No. 8825 of the docket of the civil district court for the parish of Orleans, entitled State *ex rel.* The New Orleans and Pacific Railway Co. *vs.* D. M. Brosnan, city surveyor, together with all the evidence adduced, documents, letters, maps, drawings, etc., filed therein and therewith.

8th. The map or drawing made part of the record in the case just referred to, which is marked "E," and the correspondence therein on file had between Col. Wheelock, agent of plaintiff, and Brosnan, the defendant.

9. Map offered in connection with the testimony of Harrod, marked "R. No. 4."

10. Exhibit "P," made part of the first supplemental bill filed herein on behalf of complainant, marked as above.

And the cause was argued by the solicitors for the respective parties and submitted, when the court took time to advise.

43 *Complainants' Offerings.*

Testimony of W. W. Howe, Edward B. Wheelock, and Charles Cavanac, taken before examiner, marked E. B. W. 1, offered Feb'y 24, 1891.

United States Circuit Court, Eastern District of Louisiana.

THE TEXAS PACIFIC RAILWAY CO. *et al.*
vs.
THE CITY OF NEW ORLEANS. } No. 11397.

Testimony taken on behalf of the complainants, under the 67th rule, as amended, of the courts of equity of the United States, before Thomas McHyman, Esqr., special examiner duly appointed and qualified to take and return the depositions of witnesses for complainant and defendant respectively in the above-entitled cause, at new Orleans, this 12th day of February, 1887.

Present: W. W. Howe, Esqr., solicitor for complainants; Walter H. Rogers, Esqr., solicitor for defendant.

Mr W. W. Howe, on behalf of the complainants, offers in evidence the acts of Congress and the acts of the legislature of the State of Texas and the acts of the legislature of the State of Louisiana as set forth and enumerated in the first paragraph of the bill of complaint herein, it being agreed by the respective solicitors that said acts may be referred to in the printed statutes, and in case of
44 an appeal need not be copied into the transcript.

And complainants specially offer act No. 14 of the statutes of the State of Louisiana for the year 1876, said act 14 being the charter of the New Orleans Pacific Railway Company, to which the said agreement refers.

Also the ordinances set forth in the bill of complaint, being numbers 6695, adopted by the city council of New Orleans on November 9, 1880.

No. 6732, adopted December 3d, 1880.

No. 6938, administration series, adopted March 29, 1881.

No. 7946, administration series, adopted July 11, 1882.

It is conceded that the date of this latter ordinance is July 11th, 1882.

Complainants offer, for the purpose of proving *rem ipsam*, the two ordinances, council series, that they complain of, at page 12 of the printed bill, No. 1828, council series, approved on the 16th June, 1886, and adopted June 8th, 1886. This ordinance is offered for the purpose of showing such an ordinance was adopted by the present council. For the same purpose the complainants offer the ordinance No. 685, council series, approved April 24, 1884.

Complainants also offer the consolidation deed by which the Texas Pacific Railway Company acquired the railway and appurtenant property of the New Orleans Pacific Railway Company. That deed is dated June 20, 1881, made by and between the New Orleans

Pacific Railway Company and the Texas Pacific Railway Company and referred to in the first paragraph of the bill of complaint.

It is agreed that a copy of the said deed may be left in the record instead of the original.

45 Complainants also offer the letter of Kennard, Howe & Prentiss, attorneys, to D. M. Brosnan, city surveyor, of May 9, 1883, marked "K. B.," *rem ipsam.* They also offer the answer of D. M. Brosnan to the above letter, marked K. H. P.

W. W. HOWE, a witness produced, sworn, and examined on behalf of the complainants, deposes and says:

On the 26th day of March, 1884, on behalf of the Texas Pacific Railway Company and at the request of Mr. Wheelock, its agent, I made a tender to Mr. B. T. Walshe, then treasurer of the city of New Orleans, of the sum of five hundred dollars for one year's rent of what is known as the batture in front of the City park under ordinance No. 6938, administration series. This tender was made in one five-hundred-dollar United States Treasury note, and Mr. Walshe declined to receive it. I offer, in connection with this statement, a copy of the letter which accompanied the money and the memorandum made at the time, at the foot of it, of what we did; that will be marked "K. W." We also offer in evidence the resolution of the board of directors of the New Orleans Pacific railway; also the letter of Mr. Wheelock notifying Mayor Shakespeare of the acceptance of the grants made in the ordinance, including a copy of the above resolution, to be marked "E. B. W."

EDWARD B. WHEELOCK, a witness produced, sworn, and examined on behalf of the complainant-, deposes and says:

By Mr. HOWE:

Q. You are president of the New Orleans Pacific Railway Company?

46 A. Yes, sir.

Q. And you have been such from its organization?

A. Yes, sir; since its organization.

Q. State whether you have been agent of the Texas Pacific Railway Company since the consolidation.

A. Yes, sir; I have been, and I am still agent.

Q. Please state whether you acted for the New Orleans Pacific Railway Company at the time the ordinances in question in this case were adopted.

A. I did.

Q. Please state whether or not the grants made by these ordinances were accepted by the New Orleans Pacific Railway Company.

A. Yes, sir; they were.

Q. State, firstly, with regard to the establishment of a terminus in the city of New Orleans, where that terminus was located, and state briefly and generally the work that was done there and the value of it.

A. The terminus was established in March, 1882, on the property owned by the company, located between Thalia and Terpsichore streets.

Q. Fronting on the river?

A. Fronting on the river and extending back as far as the Orleans press.

Q. State in round numbers the cost of that work and property, including the ground.

A. $175,000, I believe. In addition to that, the depot building, eight hundred feet, about, in length, with its necessary tracks, sidings, turnouts, inclines, and wharf, waiting-room for passengers, etc.

47 Q. State whether or not transfer facilities were put in there.

A. Yes, sir; everything necessary to the operation of the road.

Q. State if transfer facilities were put in.

A. Yes, sir; the proper erection of transfer facilities, side tracks, etc.

Q. Say if a transfer-boat was procured.

A. Yes, sir; a transfer-boat and all the appurtenances necessary to transact a freight and passenger business.

Q. I understand you that that terminus was established at that place by March, 1882. How was that connected with Baton Rouge, by means of the transfer-boat, tracks, and the like?

A. It was connected with Baton Rouge by a branch line from Baton Rouge Junction to West Baton Rouge by the ferry-boat from Baton Rouge.

Q. The road was also completed from Gouldsboro, opposite Thalia street, to Baton Rouge Junction?

A. Yes, sir.

Q. Thence to West Baton Rouge?

A. Yes, sir.

Q. From Baton Rouge to West Baton Rouge by ferry?

A. Yes, sir; and also to Shreveport.

Q. In other words, I understand you that in March, 1882, the railroad was completed with the terminus in the city of New Orleans so as to connect with Baton Rouge and Shreveport?

A. Yes, sir.

Q. Calling your attention to the bill of complaint at the printed page 9, I find that ordinance of July 11, 1882, No. 7946, administration series, which states in its preamble the following: "And

48 the company has completed its road from Baton Rouge to New Orleans, crossing at Thalia street, and established its terminus in the city limits at Thalia street and the levee." Please state if that is correct.

A. Yes, sir; it is correct.

Q. That recital is true?

A. Yes, sir; that recital is true.

Q. Can you estimate, as a mere matter of approximation and round figures, what was the total expense of establishing that ter-

minus within the city limits at Thalia street, including the cost of the ground and building and including the transfer facilities?

A. In the neighborhood of $300,000, I should judge.

Q. Do you happen to know whether since that time the complainant company has been called upon to pay a large amount of taxes on that property?

A. Yes, sir; we have paid a large amount of taxes regularly upon it.

Q. Do you know about the amount of the assessment on that terminal property or that part of the property in the city of New Orleans?

A. The assessment was based exactly upon the purchase price that we paid to Mr. Sheppard for the land and the other proprietors from whom we bought the property, and the depot building was assessed at the actual contract price paid for it to the contractor.

Q. Will you state whether you have acquired other property in connection with these terminal facilities with a view to the grants made in these ordinances?

A. Yes, sir; we acquired a half square above Terpsichore street, with the batture rights, and four squares of ground in the
49 sixth district adjoining the Upper City park, fronting on the river—four solid squares, two squares fronting the river and two in their rear.

Q. What assessment has that property?

A. That property is assessed at $32,000. However, we only pay $24,000 for it—$6,000 a square.

Q. And the half square above Terpsichore street?

A. I think it was that we bought from Johnson, at Terpsichore street, at about $45,000—somewhere in that neighborhood, I think.

Q. Will you state, in regard to the batture in front of the City park mentioned in one of these ordinances, how much rent was paid to the city of New Orleans in cash upon that lease?

A. I paid two years' rent March, 1882, and March, 1883—$500 each year.

Q. And you were also cognizant of the tender I made of another $500?

A. Yes, sir; I think you made it at my request. I was absent then from the city.

Q. Has the city of New Orleans ever refunded or offered to refund to the complainants that amount of money?

A. No, sir.

Q. I would like to direct your attention now to the question of lines between Louisiana avenue and Jackson street. Complainants claim that they are entitled to the lines between Louisiana — and Jackson street, on the river front, so as to connect the terminus between Thalia and Terpsichore street- with the contemplated line running up from Louisiana avenue to the park?

A. Yes, sir.

50 *A. Yes, sir.*

Q. I have offered in evidence a letter marked K. H. P., from my firm to Mr. Brosnan, city surveyor, and also his reply,

marked K. B. Referring to these documents, will you please state whether you have made a demand on Mr. Brosnan for these lines, and whether he has promised to give them and afterwards he has refused to give them?

A. I have made repeated demands upon him for them. He promised to give them and went over the ground in company with me and some other gentlemen for the purpose of deciding on the location of the line at some point where it was thought there might be some doubt as to the practicability of putting down another track. Mr. Clarke, of the Illinois Central railroad, was one of the parties; he controls the Belt railroad. Mr. Cavanac was also with us—myself and Mr. Brosnan. Our division superintendent at that time, whose name was Wheedon, was also with us, and I think one of the city administrators likewise; and it was decided at that time that there was no special obstacle in the way of putting down the track. Mr. Clarke said that wherever it was necessary to enable us to put down our track he would move his track over to one side or the other.

Q. Give some of the details.

A. There was one place in particular that was immediately in rear of the car shed and in front of the stables, on Louisiana avenue, where the street apparently was too narrow for two tracks. Mr. Brosnan said and one of the administrators said, as there were little, low buildings on the river side of the street, that they were
51 over beyond the line and could be moved back. The question was then discussed, and Mr. Clarke finally said, anyhow, there was another way to remedy the difficulty; if there was not room, we could put a switch in on his track, so as to get by this narrow place, and then lead a switch in on our own track again. That was the only place where there was any supposed trouble in putting down the two tracks. We walked down, however, to Jackson street, discussing different points, and we finally decided that there was no physical difficulty in the way of putting down the track of the New Orleans Pacific road on the same street with the Belt railroad track from Louisiana avenue to Jackson street.

Q. State generally whether the lines were promised to you at that time.

A. The lines were promised and I paid for the lines. I paid the surveyor for running the lines.

Q. What surveyor did you pay?

A. Mr. Brosnan.

Q. Referring to this letter of Mr. Brosnan, marked K. H. P., can you state about the date of these circumstances?

A. My impression is it was along in the summer time.

Q. This letter is dated in May, 1883?

A. I think it is. I know it was a pretty warm day making that trip. I could not state exactly the time, but I should think it was in May or June, 1883.

Q. State whether the city surveyor afterwards refused to give the lines between Louisiana avenue and Jackson street.

A. Yes, sir; he said that it was disputed by some members
52 of the city council whether we had a right to have the lines made and the track go down that street.

Q. As I understand, it was claimed at the city hall that you had no right to go down along the river front from Louisiana avenue to Jackson street, and the city surveyor afterwards positively declined to turn the lines?

A. He took my map and said he would place that line upon it. He kept it some weeks, promising every day to complete it, and finally he returned it to me in a mutilated condition, without the line on it from Louisiana avenue to Jackson street. The map furnished me originally by Mr. Brosnan, purporting to give me the lines, was made in sections—a large map—and it was some time before I discovered that they had run our lines by this map down Louisiana avenue instead of from Louisiana avenue to Jackson street. I called his attention to that fact in the presence of Mr. Cavanac, and he, Mr. Brosnan, said if I would send the map up to him he would rectify it or correct it. I sent the map and he fixed various dates on which he would give it to me. Finally he sent me the map with a piece about five feet in size cut out of the middle of it. He cut out that part locating us upon Louisiana avenue and failed to put on the location from Louisiana avenue to Jackson street; but he neglected to erase his certificate, signed in his own handwriting, on the corner of the map, which is proof of itself that the map had been mutilated. It is said on this map these lines were run according to such and such ordinances, and it was afterwards decided at the city hall that we had no rights between Louisiana avenue and Jackson streets.

53 Q. State for the information of the court the general outline of this plan of the ordinances and why it is that this connection along the river front from Louisiana avenue to Jackson street is an essential part of the plan, so that the court in reading this record would understand what you are speaking about.

A. This company owns at Westwego one hundred and thirty acres of land, terminal property. The object of acquiring the park batture and the purchase of the four acres of ground adjoining it was with the view of establishing a crossing by which the cars of this company, either freight or passenger, could be brought into the business portion of the city by the shortest and most economical route, and therefore the ordinances were asked for to give this company the right to run its lines from the park batture either along the line of the City park or through Walnut street, as the administrators might determine. To obtain, then, on the river side of Saint Charles street the right from there by the shortest available line to Claiborne street, following Claiborne street to Canal street, the company having also applied for the right of way through Thalia street to connect with this line, giving them a direct line to their terminal property on the river front at Thalia street. The right of way on Thalia street was contested in the courts and finally decided in favor of the company by the supreme court of the State. The object in having a line down from the batture to the terminal

property at the foot of Thalia street on the river front was for
54 the purpose of delivering freight which might be required to be delivered along the river front in front of the various steamship lines or wharves and also at its terminal property located, as above, at Thalia street, making, as it were, a sort of belt road by which the property of this company could be reached by two different routes. It was anticipated that the passenger business would be carried through the route designated along the upper line of the park and through Claiborne street to Canal—that portion of the line would be more particularly used for passenger purposes. An objection was made in the city council by a member, or, I think, two members, with regard to the granting of the right of way to the company com- down from Louisiana avenue to Jackson street, as it would interfere, and I put in a proviso that it was only in cases of emergency that the cars should be run on that line, and then only after sundown in the evening and before sunrise in the morning, making — adapted only to passenger travel.

Q. In brief, the plan of the ordinances which are set forth in the bill contemplated a line all the way from Thalia street along the river front to the park batture?

A. Yes, sir; and along the upper line of the park to Claiborne street and through Claiborne street to Canal.

Q. And then across again from Claiborne street, through Thalia street to the same Thalia-street terminus?

A. Yes, sir.

Q. State generally whether you have made repeated demands for these lines and whether they have been refused—I mean the lines from Louisiana avenue to Jackson street on the river front.

55 A. Yes, sir; repeated demands.

Q. Referring to the question of the passenger depot on Claiborne street and referring to the ordinances *from* at pages 9 and 10 of the printed bill providing for the selection of a site to which the Claiborne market might be removed in order that the passenger depot might be built, will you state what steps you took after the passage of that ordinance (which is admitted to be of date July 11, 1882) for the purpose of requiring the city authorities to select such a lot?

A. I had a conference with the administrators about the removal of the market. I do not know their names now, but Mr. Mealie was one and Mr. Fitzpatrick was another.

Q. You conferred with the administrators mentioned in that ordinance?

A. Yes, sir; I saw all of them, and they fixed a time at which we would go and look at some property. Mr. Cavanac was along at that time; he went in a carriage, I think. They were some lots, I believe, out at the charity hospital. I had two or three interviews with them, but on this special occasion we went there to look at the lots, and I told them that at any time I would buy the ground and take the market down and put up another market. If this did not suit them I asked them to be silent for a little while, because the people if they knew the railroad wanted them would

ask too much for them. I told them I would take down the market and put up another market much better. They took the matter into consideration, but declined to do anything in the matter.

Q. State whether you made repeated demands on the ad-
56 ministrators mentioned in that ordinance to do that duty and select a new site for the Claiborne market.

A. Yes, sir; I did.

Q. That must have been after the passage of that ordinance of July 11, 1882.

A. Yes, sir; it was during that summer of 1882.

Q. Do you remember whether Colonel Cavanac, who is now present, was in this conference when you made this demand?

A. Yes, sir; he was.

Q. Did these administrators or their successors ever carry out the provisions of that ordinance?

A. They did nothing about it that I know of.

Q. They have never designated any lots of ground to which you could remove the Claiborne market?

A. No, sir.

Q. Recurring to the grants made with reference to the terminal property on the river front, between Thalia and Terpsichore streets, please state whether the New Orleans Pacific Railway Company and its assigns, the Texas Pacific Railway Company, have ever complied with that part of the ordinance requiring them to build certain wharves in lieu of the wharf occupied by them in front of the riparian property. When the ordinance was adopted what was there?

A. There was a delapidated wharf, which was not used for receiving or discharging cargo, but on the approaches to it. The wharf was eventually torn down and removed entirely, and the piles were taken out, and in compliance with the ordinance this company built them a new wharf at an expense of $5,000—built to the
57 satisfaction and approval of the city administrators and the city surveyor.

Q. Where was that built?

A. I do not remember exactly now.

Q. It was above your property?

A. Yes, sir; at the place located by them, three hundred feet in length.

Q. That, I understand, was done in compliance with the provisions of the ordinance which required you to build three-hundred-feet wharves for the city on the place they should designate in lieu of the place you were to ask them on the Thalia-street property?

A. Yes, sir.

Q. Was that done?

A. Yes, sir. Before I paid the contractors I had Mr. Brosnan's written acceptance of the wharf, built according to the specifications of the contract.

After which the further examination of this witness was postponed to Wednesday, the 16th day of February, 1887, at twelve o'clock m.

NEW ORLEANS, *February* 16, 1887.

TEXAS & PACIFIC RAILWAY CO.
vs.
THE CITY OF NEW ORLEANS. } No. 11397.

Testimony on behalf of the complainant resumed this day at twelve o'clock m., as per adjournment.

Present: W. W. Howe, Esqr., solicitor for complainant;
58 Walter H. Rogers, Esqr., solicitor for the defendant.

E. B. WHEELOCK, a witness for complainant, is recalled for cross-examination.

By Mr. ROGERS:

Q. You testified with regard to the completion of the road from Gouldsboro' up to Thalia street and thence to Baton Rouge Junction?

A. Yes, sir; to West Baton Rouge, not to Baton Rouge Junction; to West Baton Rouge, and there we connected by ferry with Baton Rouge.

Q. You say that is completed?

A. Yes, sir.

Q. Completed at this date?

A. Yes, sir

Q. Completed as a permanent work?

A. Yes, sir.

Q. With the ferry still running?

A. Yes, sir; we pay the ferry $250 a month to connect with our trains.

Q. That also connects with that branch road from the junction to West Baton Rouge and is still in operation?

A. Yes, sir.

Q. Did your company ever acquire or hold title to any property, as you say, which was designated or suggested as a proper site for the Claiborne market?

A. We never bought any property for it.

Q. Have you any title to property in the vicinity or in the neighborhood of that vicinity belonging to your company?

59 A. Except what the ordinance has provided for us, the right of way on Claiborne street.

Q. The right of way on Claiborne street?

A. Yes, sir.

Q. But I mean any real estate?

A. No, sir; no real estate.

Q. In regard to your terminus. You have no other terminus within the city limits except the one specified on Thalia street?

A. Well, under this ordinance we would have rights which we do not now use. We receive and discharge freight and receive and discharge passengers at the foot of Thalia street. That is our business terminus.

Q. Is that the terminus of your railroad?

A. That is the terminus of our railroad.

Q. That is the terminus upon which you have finally decided, which is the permanent terminus of your railroad?

A. Well, it is the terminus up to this time. I cannot say that we might not have another landing. That would depend. We might have a landing up opposite Westwego; but that is the terminus of the line now, and where we transact our business in both passengers and freight.

Q. What permanent conditions have you fixed for this Thalia-street terminus?

A. I do not know that I understand you.

Q. What are the conditions of the terminus there?

A. The physical conditions?

Q. Yes; and the theor-i-al conditions.

A. Our storage capacity there is sufficient for the amount of business that we are doing at present, in the shape of a depot.

60 Q. On this side of the river?

A. Yes, sir; on this side.

Q. What kind of a depot?

A. A brick building.

Q. For freight or passengers?

A. Freight, with four tracks in the center of it, and eight hundred and forty feet long.

Q. Does that occupy all your property there?

A. No, sir; not all of it.

Q. You have other property there?

A. Yes, sir.

Q. How much other property have you there besides that?

A. We have a square back of it, between that and fronting the press, of which we use scarcely one-half at present. Then we have a half square above Terpsichore street, which we call the cotton yard, for flat or uncompressed cotton, city delivery, which we generally unload there. We have a passenger depot on the levee also, near our incline, a baggage-room, a waiting-room, *a baggage-room*, a restaurant, etc.

Q. What is the character of these buildings—that passenger depot?

A. The passenger depot is a slate-roof wooden building.

Q. A permanent structure?

A. Yes, sir. It is not the largest depot in the country, but it answers our purposes for the present.

Q. I understood you to say just now that you had established this terminus at Thalia street, but that it was the only terminus of the railroad, for the present, that you had there.

A. No, sir; I did not say that. I said that the company might at some future time have additional landing places if we

61 desired it. They would be within the city limits, however.

Q. If they had that still in contemplation, how can you determine upon the location of the Thalia-street depot as a permanent station?

A. We did not have it in contemplation. I never said so, but I said it was one of the possibilities. You cannot tell what a railroad corporation will do ten years from now; but, with the rights and privileges accorded to us by the ordinance which the city has granted us, together with our charter rights, we might establish as many depots as we please in the city for the transaction of our business.

Q. I suppose you are aware that one of the obligations which you say you have accepted in regard to these grants of the city was that you should permanently establish your terminus within the city limits and use the same during your existence as a corporation?

A. Yes, sir; that is a part of the obligation.

Q. And that it should be maintained for the public use from the crossing of the Mississippi river to the designated terminus; that you were to designate your terminus, and that you must do that within two years?

A. Yes, sir.

Q. Did you understand that condition of your grant when you made that statement with regard to your terminus?

A. Fully. The terminus was established within the two years and so admitted by an ordinance of the council, I believe; and we have complied with the ordinance in that respect. We did not buy $175,000 worth of real estate there to throw it away.

Q. I understood you to say that you had never received
62 these from the city of New Orleans from Louisiana avenue to Jackson street?

A. No, sir; I did not receive the lines for that distance.

Q. You complain of that as one of the grounds of injustice to your company, do you not?

A. Yes, sir.

Q. I understood you to say that you made a demand on the city surveyor for these lines.

A. Yes, sir.

Q. And he refused them?

A. He furnished me a map, on which I supposed the lines were laid. As I stated before, the map was made in sections; it was not drawn continuously in one line, and I kept the map in my possession for some time before I found it out. The engineers were looking at the map with the view of commencing work as soon as the lines were furnished, and they reported to me that there were no lines on the map between Louisiana avenue and Jackson street and reporting also the lines that were on the map. They said there was a line on the map to go down Louisiana —, and I said we had no right to go down Louisiana avenue. We never asked for this there. When that fact was reported to Mr. Brosnan he told me it was a mistake, and that if I would send the map up he would rectify it by giving me the right lines.

Q. Under what ordinance do you claim that right was granted to you from Louisiana avenue to Jackson street?

A. Under section 3 of ordinance 6938.

Q. Then you rely on section 3 of ordinance 6938 for your
63 authority to have these lines?

A. Yes, sir. I want to state here that the reason we put in that to connect with Louisiana avenue was simply because the Belt railroad might, at some future time, change its gauge and we should want a connection with them; and this ordinance would give us the right to put in a connecting switch there without going back to the council to get that right, otherwise the connection would be of no use to us, because our track was four feet eight inches and a half and the Belt railroad was, until within a few months ago, *g*ive feet.

Q. Now, without the lease of this batture property that you claim in this suit, what would be the necessity for these lines, especially along the river front, to connect with the Belt railroad at Louisiana avenue? Is not this complaint with regard to the extension of the line on Louisiana avenue connected with some condition or matter as affected by your lease of the batture property?

A. I do not know that I understand you. You ask whether we want a line down the river front from the park batture to Louisiana avenue, and then down to connect at Jackson street?

Q. Yes

A. Well, the advantage of that would be apparent to you when you understand that if we put a crossing in, from the terminal property at Westwego to this side, it would be of great advantage to have the track down along the river front, so as to place the
freights at the different ships or presses; and also to have the
64 right to go across to Claiborne street and come to Canal street for passengers. That, with the right at Thalia street, would make a belt through the upper portion of the city.

Q. Then it had reference to the terminus at Westwego?

A. No, sir; not the terminus; but we have one hundred and thirty acres of ground there. But the probability is that, if that plan was carried out, that is the place where we would store our cars or empties.

Q. You would establish another crossing at Westwego, in addition to that at Thalia street?

A. That ordinance provides so. The upper crossing would more probably be for passengers than to go to the Thalia-street terminus proper; otherwise we could not use the Thalia-street property. We would not run our cars over from the other side over to Claiborne street, through the streets.

Q. Then you anticipated to make a connection with this batture property?

A. The batture property was deemed valuable to us in connection with the four solid squares which we bought below it. For instance, the company bought all the land; this park batture would enable us to run the lines above the park and cut off and go out through Walnut street to Claiborne street.

Q. How did you expect to get to Claiborne street—from your landing opposite Westwego to Claiborne—what streets?

A. Well, it was expected they would give us Walnut street all along the line of the park; and the gentlemen that went up—Mr.

Fitzpatrick here was one—stated that the conclusion was we had better take Walnut street, as very few people were living on it.

65 Q. Then I understand you to say that the lines had never been given to you by the city surveyor for this track?

A. Not between Louisana avenue and Jackson street. He told me it was a mistake that the lines were not on my map, and if I would send the map back he would correct it. I told him we never were authorized to go through Louisiana avenue. All we had to do with Louisiana avenue was to connect there.

A. Is that the map you say the city surveyor cut and pasted together?

A. Yes, sir; that is the map.

Q. You say it was this map furnished to you by the city surveyor and upon which you supposed that these lines had been given you from the City park to Louisiana avenue?

A. Yes, sir.

Q. And that after an examination of this map you found that these lines had not been given you, but that the line had been laid out through Louisiana avenue?

A. Yes, sir.

Q. That which you state you were not entitled to?

A. No, sir.

Q. The city surveyor's attention being called to that, he said he would correct it?

A. Yes, sir.

Q. You sent him the map?

A. Yes, sir; and I got that map in that condition after awhile.

Q. Cut in that condition?

A. Yes, sir.

(Map spread on table.)

Q. Do you see anything taken from this?

66 A. Except I do not see the line running from Louisiana avenue to Claiborne street—cut out.

Q. Is there any line found on this map running from the City park to Louisiana avenue?

A. Yes, sir; it runs through Claiborne street to Canal.

Q. As indicated by you, is this the line that you wanted and complain of never having received?

A. With the exception of the line from Louisiana avenue down to Jackson street.

Q. Is there any line running from Louisiana avenue down to Jackson street?

A. Not on this map.

Q. And that is the line that he refused to give you?

A. That is the line he told me he would give me, but he did not.

Q. But he did give you a line from the park batture down to Louisiana avenue?

A. Yes, sir; up around by the line of the park to Claiborne street and from Claiborne street to Canal.

Q. But he did not give you the line from Louisiana avenue to Jackson street?

A. No, sir.

Re-examined.

By Mr. HOWE:

Q. I may anticipate the statement in the answer by asking this question. At page 7 of the manuscript answer in this case I find this statement:

"On the contrary, this defendant now alleges the consolidation of said New Orleans Pacific Railway Company with the
67 Southern Pacific Railway Company and the Texas and Pacific Railway Company was for purposes antagonistical to the interest and prosperity of this city; that by this arrangement was effected a combination of three distinct railway organizations and communications in the interest of the lines and corporations antagonistic to that portion represented by the New Orleans Pacific Railway Company."

Please state whether there has ever been any consolidation between the New Orleans Pacific Railway Company and the Southern Pacific Railway Company.

A. No, sir; none whatever.

Q. State whether it is not true that the New Orleans Pacific division of the Texas and Pacific railway is a competing line of the Southern Pacific.

A. It assuredly is.

Q. State whether the consolidation between the New Orleans Pacific and the Texas and Pacific was made with any purpose antagonistical to the interests and prosperity of New Orleans.

A. On the contrary, this consolidation with the Texas and Pacific was of vast importance to New Orleans, and any railroad man will agree with me in that who understands the nature, character, and business and the manner in which railroads conduct their business.

Q. Is it not true that that consolidation of the Texas and Pacific with the New Orleans Pacific and its connecting lines makes New Orleans the terminal port for almost all the railroads west of the Mississippi?

A. Yes, sir; the Texas and Pacific, since its consolidation
68 with the New Orleans Pacific, never has been managed adversely to the interests of New Orleans.

Q. And considering the line formed by that consolidation as to giving a connection between the port of New Orleans and the Northwest and Southwest, what effect is it likely to have upon the prosperity of New Orleans?

A. Largely increase its commerce, which it otherwise could not do without a connection with the Texas and Pacific. I challenge anybody to show that there has been any discrimination of rates made in points south of Texarkana and west of Marshall. They have always kept there agreement with me that the New Orleans

rates should be same from New Orleans and Galveston as they are to and from all points south of Texarkana and west of Marshall.

By Mr. ROGERS:

Q. The Southern Pacific Railroad Company and the Transcontinental Railroad Company are all chartered under the laws of Texas?

NOTE.—As to the allegation in the answer with reference to the Southern Pacific Railway Company, it is understood by counsel to have reference to the corporation formerly existing under the laws of Texas, which was merged into the Texas Pacific, and does not refer to Mr. Huntington's road.

Q. What I want to get at is this: The Texas and Pacific Railway Co., as it now is understood in this case, embracing the Southern Pacific railroad, the former corporation; the Southern Transcontinental Railway Co. The New Orleans Pacific Railway Company and the Texas and Pacific Railway Company now form one corporation by merger, as alleged in the bill?

69 A. Yes, sir.

Q. Can you give me the names of the various lines which make up the Texas and Pacific railway, as now understood by all these mergers?

A. Well, the Texas and Pacific railway——

Q. That commences at New Orleans?

A. Yes, sir.

Q. And ends where?

A. Its main line commences at New Orleans and ends at El Paso. Then it has the Transcontinental division, which extends from Marshall, by way of Texarkana, west from Denison to Fort Worth. That is the Transcontinental branch.

Q. I want to ask whether it is not a fact that this railroad is divided into bonded divisions?

A. There is but one character of stock in the whole line, and is divided into bonded divisions—the bonded debt of the New Orleans Pacific; the bonded debt of the Middle division, which includes the Transcontinental—it is sometimes called the Eastern division—and then there is the Rio Grande division. A different series of bonds, but one common stock.

Q. The common stock results from the merger?

A. Yes, sir.

Q. They are all separate corporations, and the bonded debts are all separate?

A. Yes, sir; except that a terminal mortgage exists as a mortgage on the whole—a blanket mortgage.

Q. Is not Louisiana avenue marked on this map, while no right of way has been granted to this railroad company on that avenue?

A. We never asked for a grant of right of way on Louisiana avenue.

70 Q. But had not the map one marked on it?

A. The one I got, it had Louisiana avenue.

Q. Had it not also marked on it "no right of way" granted on it, Louisiana avenue?

A. No, sir; not that I know of.

Q. Could the city surveyor eliminate the line on Louisiana avenue off the map without cutting the map?

A. He could have made the map all over again if he liked.

Q. But could he eliminate it—could he take it out of that map?

A. I know it was on the original, and I don't know why it is not on this.

Q. You do not know that he cut it?

A. I know it is not on it. The map is five feet shorter now than when it went away.

Q. Did the city surveyor not offer you a new map without a cut, as the one now appears without "Louisiana avenue" on it, and did you not refuse to accept it?

A. If he did it did not have the line on it from Louisiana avenue to Jackson street. I do not know what he offered me; I did not take it and look at it. I only know that when he sent the map back he had not put the line from Louisiana avenue to Jackson street upon it, because he said we had no right to it.

Q. Did he not make a new map without "Louisiana avenue" and you refused it?

A. Well, Mr. Cavanac may remember that better than I do. He had more interviews with Brosnan than I had. I do not remember
71 him offering me any map. If he did I simply did not look at it, because it was not what we wanted. The reason he did not put it down finally was because he said we had no right on that part of the street.

By Mr. HOWE:

Q. You were asked whether you had as yet purchased any property near the Claiborne market for the purpose of erecting and rebuilding the Claiborne market when it should be removed to give place to the passenger depot. Have the authorities ever designated any property for you which you could purchase?

A. No, sir.

Q. Is it not true that you have made repeated demands for such designation and they have not made it?

A. Yes, sir. I was always ready to buy the property when they should designate it. I was authorized to buy it and pay for it.

Q. You were asked with regard to these lines between Louisiana avenue and Jackson street and how it was they were necessary, and it was intimated, as I thought, that if you had no rights on the park batture you would not have any rights on these lines. Now, if it — not true that if you had no rights on the park batture, you had four squares on the river bank that might be connected with the Thalia-street station?

A. Property might be acquired.

Q. Yes; but you have four squares there now?

A. Well, I do not know they would be sufficient until the engineers determine that.

Q. But the crossing could be made on these four squares of ground from Westwego?

A. Yes, sir.

72 Q. There is room on four squares of ground for it?

A. Yes, sir.

Q. They have the same width as the Thalia-street terminus?

A. Yes, sir; but I don't know how you would keep up the upper end of the park.

Q. But I am speaking now of coming over to the four squares of ground and then to Thalia street.

A. Yes, sir.

Q. Crossing over the river from Westwego to the four squares of ground up there and then to these four squares on Thalia street?

A. Yes, sir; that, undoubtedly, could be done.

CHARLES CAVANAC, a witness produced, sworn, and examined on behalf of the complainant, deposes and says:

By Mr. HOWE:

Q. State your age.

A. I am forty-eight years old.

Q. You reside in the city of New Orleans?

A. Yes, sir.

Q. How long have you resided in the city of New Orleans?

A. For thirty years.

Q. State whether you have ever held any position in connection with the State government.

A. Yes, sir.

Q. State briefly what positions you held.

A. I was administrator of commerce of the city of New

73 Orleans and supervisor of registration, parish of Orleans.

Q. You are now tax collector of the lower districts?

A. Tax collector of the lower districts.

Q. How long were you administrator of commerce?

A. Two years.

Q. Did you have occasion, as administrator of commerce, to be familiar with the river fronts, the relations of the streets, and the necessities of commerce?

A. Yes, sir.

It is admitted that the administrator of commerce was a municipal officer under the city charter of 1870, and that his duties were those set out in the charter.

Q. Have you heard the testimony which has been delivered by Col. Wheelock in this case so far?

A. Yes, sir.

Q. Do you remember having gone with Colonel Wheelock and other gentlemen to see with regard to the lines which were claimed by the Texas and Pacific Railway Company under the ordinance in question in this cause?

A. Yes, sir.

Q. It was stated by Colonel Wheelock that was in the summer of 1883?

A. Yes, sir.

Q. Do you remember if that is about the correct date?

A. Yes, sir; that is about the time

Q. Will you state briefly what you know with regard to the controversy that arose with respect to these lines?

A. I made an arrangement for Mr. Wheelock with Mr. Brosnan to go up and lay out these lines. The arrangement that I
74 made did not take place, and Mr. Brosnan communicated to Mr. Wheelock that he could not go up that day, but named another day. We went up on the day named—it was in the summer of 1883—Mr. Wheelock, Mr. Brosnan, Mr. Wheedon, the superintendent of the Texas and Pacific railway; Mr. Fagan, and, I believe, Mr. Fitzpatrick, the administrator of improvements.

Q. Mr. Fagan was then administrator of commerce?

A. Yes, sir; Mr. Fagan was administrator of commerce. There was also Mr. James C. Clarke, the superintendent and general manager of the Jackson railroad. We went up in carriages to Louisiana avenue and walked down to Jackson street. Objections were made by some of them that the street was too narrow, and at one place Mr. Brosnan said that these houses which were on the river front were on the street, but that they could be removed, Mr. Clarke stating that at any place where it was narrow and not room enough he would move his tracks in towards the river or towards the woods, as they desired it. They had the right of way over the Belt railroad. At one place, where the elevator was at Louisiana avenue, I heard Mr. Clarke state it was narrow, but that he had no objection to their putting in a switch at that point to go out further below, meaning on the track of the Belt railroad.

Q. What was the general conclusion of this meeting?

A. That the lines should be furnished, and Mr. Brosnan said he would furnish them the next day.

Q. Do you remember whether the question of the third rail was discussed in connection with the Belt railroad whenever it was necessary?

A. I do not remember that of the third rail, but I do re-
75 member now Mr. Clarke's saying that where the street was narrow they could connect with his track at that point.

Q. But that connection would be made in some practicable form?

A. No, sir; not without the third rail on the track.

Q. The general conclusion at that interview was that the lines should be given to the Texas and Pacific railway from Louisiana avenue to Jackson street along the river front, as claimed under the ordinance?

A. That was the understanding with all of them when we came down.

Q. Had you anything further to do with the controversy that arose with regard to these lines?

A. No, sir; except to ask Mr. Brosnan for the lines several times. Mr. Wheelock requested me to see Mr. Brosnan and ask him if he

had the lines ready, but he postponed it from day to day and did not give them at all.

Q. Then it was not due to you that he finally refused to give them?

A. No, sir; Mr. Wheelock told me he never got the lines from Mr. Brosnan.

Q. Let me direct your attention to the ordinance of July 11th, 1882, which is set out in the printed bill of complaint in this case, which provides for the appointment of a committee of administrators to select some new site for the Claiborne market and to confer with the railroad company with regard to it. Please state whether, soon after the passage of that ordinance, in July, 1882, you had occasion to go with Colonel Wheelock to see with regard to it.

A. I went to the city hall to make arrangements with Mr. Fagan—and I am pretty certain with Mr. Fitzpatrick—to go out and locate the ground for the rebuilding of the Claiborne market. We
76 went in carriages, as it was a very warm day. We went out to the plat of ground fronting the Hotel Dieu—that plat of ground or angle bounded by Common, Banks, and Galvez streets. One of the administrators—I don't know which of them—said he thought that would be a very good location for it; that it would help to build up that back portion of the town, Mr. Wheelock saying if they did not fix on that, not to tell the people that they wanted ground, because then the people would ask excessive prices for it when they knew what purpose it was for. That is about all of that transaction. I know that at that time Mr. Wheelock was very anxious to rebuild the Claiborne market.

Q. Do you know of any ground ever designated to rebuild it upon?

A. I know of none.

Q. There was some testimony here with regard to the map that was furnished by Mr. Brosnan with lines to the railroad company. Do you remember whether Mr. Brosnan ever admitted in your presence that there had been a mistake in that map, putting the lines down Louisiana avenue and not from Louisiana avenue to Jackson street along the river front?

A. I do not remember having an interview of that kind. I have no recollection of it now. If an interview of that kind took place I have forgotten it. I had conversations with Mr. Wheelock on that subject, but I do not remember what they were.

Q. Do you remember whether you went to get the map which was to be corrected by Mr. Brosnan?

A. Yes, sir; I went several times for that map, but I never got it.

Cross-examined.

By Mr. ROGERS:

77 Q. Are you certain that at the time you refer to it was Mr. Brosnan or Mr. Pilie that was with you?

A. Mr. Brosnan was the man that was there. Which occasion do you allude to?

Q. The occasion that Mr. Clarke and the administrators were out; the time you designate in your testimony.

A. It was the time that we went up in carriages to Louisiana avenue. Mr. Brosnan was there. There is no doubt in my mind on that point.

Q. Who were the parties there?

A. Mr. Fagan, Mr. Fitzpatrick. I am pretty certain Mr. Fitzpatrick was there, because Mr. Fitzpatrick was the person that suggested — to Mr. Wheelock.

Adjourned without day.

78 *Charter of the New Orleans Pacific Railway Co., in Perpetuity,*

Being acts of the legislature of Louisiana—No. 14 of February 19, 1876; No. 12 of February 4, 1878—from the official journal.

Also articles of consolidation, New Orleans Pacific Railway Company with the Texas and Pacific Railway Company, June 20, 1881.

Also New Orleans city ordinances—No. 6695, November 9, 1880; No. 6732, December 3, 1880; No. 6938, March 29, 1881; No. 7946, July 11, 1882—with amendments thereto.

Offered by complainants Feb'y 24, '91.

79 No. 14.

An act to confirm the notarial charter of the New Orleans Pacific Railway Company, with amendments thereto; to extend the term of existence of said company, and to confer thereon certain powers and franchises.

Whereas, by act passed before Jno. G. Eustis, notary, at the city of New Orleans, June 29th, 1875, and duly recorded, the New Orleans Pacific Railway Company was duly organized under the general laws of the State, by the following articles:

Charter.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans.

Be it known, that on this twenty-ninth day of the month of June, in the year of our Lord one thousand eight hundred and seventy-five, and of the United States of America the ninety-ninth, before me, John G. Eustis, a notary public in and for this city and parish of Orleans, State of Louisiana, duly commissioned and qualified, and in the presence of the witnesses hereinafter named and undersigned, personally came and appeared G. W. R. Bayley, E. B.

Wheelock, Hugh Kennedy, John Phelps, John H. Kennard,
80 Cyrus Bussey, George Jonas, W. B. Schmidt, James A. Girdner, Julius Weis, E. L. Randlett and David Wallace, all residents of this city, who severally declared that, availing themselves of the powers, rights and privileges conferred by the statutes of the State of Louisiana, relative to the "organization of corporations" in this State, they do, by these presents, form, organize, constitute and found a corporation for the objects and purposes as shall hereafter be enumerated and set forth; and to that end they do hereby covenant and agree to form and constitute, and do, by these presents, form and constitute themselves, and all such other persons as may hereafter become associated with them, whether by subscription, purchase, transfer, succession, or otherwise, into a "body corporate," and thereunder bind themselves and all who may hereafter become associated with them to be governed by the following stipulations, obligations and regulations as articles of the charter of said corporation:

ARTICLE I.

Name.

The name and title of said corporation shall be the New Orleans Pacific Railway Company, and by that name shall have succession and have corporate existence for and during the full term and period of twenty-five (25) years from the date of the execution of these presents, unless sooner dissolved in the manner hereinafter provided for; may sue and be sued, may hold real and personal property, may make contracts, may receive grants of land or personal property, and shall possess all the powers and privileges which corporations are or may be, by any general law of this State, authorized to possess; and said company may exercise its corporate powers within any State of the United States that shall authorize the same.

ARTICLE II.

Capital Stock.

SEC. 1. The capital stock of this corporation is hereby fixed at three million dollars ($3,000,000), represented by thirty thousand shares of one hundred dollars ($100) each, with the right to increase said capital stock to twelve million dollars, provided that said
81 corporation shall be organized under the incorporators herein named, who shall constitute the board of directors, and shall hold their office, together with the following-named gentlemen, who shall be the officers of the company, until the second Wednesday in January, 1877: Officers, E. B. Wheelock, president; Hugh Kennedy, vice-president; S. H. Kennedy, treasurer. When one hundred and fifty thousand dollars ($150,000) of the capital stock shall have been subscribed, the board of directors are authorized to commence the construction of the road, and to carry out the provisions of this charter; to enable them to do this, subscriptions to the cap-

ital stock shall be due and payable as herein provided for when this amount has been subscribed.

SEC. 2. The time and manner of payment for stock shall be such as may be determined by the board of directors; provided, however, that no call shall be made of more than ten per cent. (10 per cent.) on each share at any time, and thirty days must elapse before another call can be made.

SEC. 3. No stockholder shall be held liable or responsible for the contracts and faults of the company in any further sum than the unpaid balance or balances due the company on shares owned by him, nor shall any informalities in the organization have the effect of annulling this charter, or of exposing a stockholder to any liability beyond the amount of his stock subscription unpaid.

SEC. 4. The domicile of the company shall be the city of New Orleans, and citation shall be served there on the president of the company, or, in his absence, on the vice-president.

SEC. 5. The stock books shall be kept at the office of the company, whence certificates of stock shall be issued to the subscribers, but no transfer of stock shall be binding upon the company until made upon its stock books, and no stock certificate shall be issued except for full-paid stock.

SEC. 6. In the case of failure on the part of any subscriber to pay the installments on his stock as required, the board of directors shall have the option, after thirty days' written notice to the delinquent, of forfeiting his stock, or the amount previously paid thereon, and no stockholder shall have the right to vote while in default.

SEC. 7. All rules relative to the declaration of dividends or divisions of profits, as well as the by-laws of the company, shall be made by the board of directors, but said rules and by-laws
82 shall be subject to repeal, change or modification by the holders of a majority of the stock of the company at their meeting.

ARTICLE III.

General Powers.

The said company is empowered and authorized:

First. To locate, construct, lease, own and use a railroad with one or more tracks and suitable turnouts, of such gauge and construction and upon such a course or route as may be deemed by a majority of the directors of said company most expedient, beginning at a point on the Mississippi river at New Orleans, or between New Orleans and the parish of Iberville, on the right bank of the Mississippi, and Baton Rouge on the left bank, or from New Orleans or Berwick's Bay, via Vermillionville, in the parish of Lafayette, and Opelousas, in the parish of St. Landry, or from any of said points, or from any point within the limits of this State, and running thence toward and to the city of Shreveport or the city of Marshall or Dallas, in the State of Texas, in such direction and route or routes as said company shall fix, and with such connecting branches in the State of Louisiana as may be deemed proper.

Second. To locate, construct, lease, own, maintain and use such branch railroads and tracks as a majority of the directors of said company may from time to time deem proper and expedient, and for the interest of said company to own and to use and lease, and they shall not be restricted in the exercise of this privilege to the State of Louisiana, but may connect their main line with any other line or lines in other States which shall authorize the exercise of said privilege within their limits; and the said company shall have a right to establish and maintain in the city of New Orleans proper freight and passenger depots, and to connect them by tracks and ferries with the left bank of the Mississippi river at such point or points as may be deemed most convenient for the public interest, and to use in such ferries, steamboats and other vessels, and for the purpose of such depots, tracks and ferries, may acquire property by expropriation.

Third. To construct, establish, or purchase in this State, and thereafter to own, lease, maintain and use suitable wharves, piers, warehouses, yards, steamboats, harbors, depots, stations, and other works and appurtenances connected with and incidental to
83 said railway and its connections, and to run and manage the same as the directors of the said company may deem to be most expedient and to the welfare of said corporation.

Fourth. To take, transport, carry and convey persons and property upon its said railway and upon its boats, by power of steam or any other power, and to receive for safe keeping and to store merchandise and property in its yards or warehouses, and to receive for such transportation, safe keeping or storage such tolls and charges as may from time to time be established or authorized to be established by directors of said railroad company; to make advances of money or credits upon merchandise or property, for charges made by other transportation lines to be transported upon its railways, steamboats or vessels, or to be stored in its yards or warehouses, to such extent and upon such terms and conditions as the directors of said company may from time to time establish or authorize to be established.

Fifth. To obtain and receive by purchase, grant from the United States or otherwise, grant, gift, devise and bequest, both real and personal property; to have and to hold such real and personal real estate in this State, for the objects, purposes, interests and business of such company.

Sixth. To construct and maintain its said railroads, or any part of the same, and to have the right of way therefor across or along or upon any waters, water-courses, river, lake, bay, inlet, street, highway, turnpike, or canal within the State of Louisiana, which the course of said railways may intersect, touch or cross; provided the said company shall preserve any water-course, street, highway, turnpike or canal which its said railways may so pass upon, along or intersect, touch or cross, so as not to impair its usefulness to the public unnecessarily, or if temporarily impaired in and during the construction of the said railroads, the said company shall restore the same to its former state, or to such a state that its usefulness and

convenience to the public shall not be unnecessarily impaired or injured, and the said company shall not be required to construct a draw in any bridge over and across any stream or bayou, except streams navigable by enrolled and licensed vessels, and when required by law.

Seventh. To obtain, by grant or otherwise, from any parish, city or village within the State, any rights, privileges or franchises that any of said parishes, cities or villages, may choose to
84 grant in reference to the construction, maintenance, management and use of the railroads of said company, its depots, cars, locomotives, and its business within the limits of such or any of said parishes, cities and villages.

Eighth. To expropriate property according to existing laws.

Ninth. To cross, intercept, join and unite its railways and prorate with any other railroad heretofore or hereafter constructed in the State of Louisiana, or any other State, at any point upon its route and upon the ground of such other railroad, with the necessary turnouts, sidings, switches and other conveniences in furtherance of the objects of its connections.

Tenth. To purchase, or lease, from any railroad company or corporation, at any authorized sale, any railroad, and the charter, franchises, property and appurtenances thereof, and maintain and use the same as a part of the property of this company.

Eleventh. To borrow money, or to purchase or lease property on its own credit, for the purpose of constructing and maintaining said railroad or establishing continuous and connecting lines as hereinbefore provided: and as evidence of the indebtedness of said company for such loans, or the purchase or lease of such property, to issue its corporate bonds or promissory notes, bearing interest at such rate per annum as the directory may elect, and made payable in gold or the lawful money of the United States, at such times and places as may be deemed most to the advantage of the corporations, and for securing the payment of said bonds or notes to mortgage and pledge its railroads, its capital stock, its corporate franchises, and any of its real or personal property, or any portion of the same.

ARTICLE IV.

Board of Directors.

SEC. 1. The corporate powers of the company shall be vested in a board of directors, composed of fifteen stockholders, to be elected in accordance with the by-laws of the company, and such officers and agents as may from time to time be appointed by such board. No person shall be a director who is not the actual owner of at least ten (10) shares of the capital stock of said company. Directors shall be elected annually, and continue in office until others are elected to fill their place, and shall have power to fill vacancies in
85 their number caused by death, resignation or otherwise. The directors shall elect one of their number as president of said

company, another vice-president, and another treasurer, and shall have power to make and prescribe such by-laws and rules and regulations, and from time to time alter, amend and revoke the same as they shall see fit touching the government of said company, the transfer of its stock, the election of its officers, the management and disposition of its business, property and effects, the powers and conduct of its officers and agents, and all other matters which shall in any way pertain to the concern of the company.

SEC. 2. All elections for directors shall be by ballot, and every stockholder shall be entitled to one vote in person or by proxy for each share of stock held by him for ninety days prior to such election.

SEC. 3. Seven of the directors shall constitute a quorum for the transaction of business, and the number of directors may be increased or diminished by a majority vote of stockholders in interest at any regular meeting, provided the number shall not be less than seven nor more than fifteen.

ARTICLE V.

Stockholders' Meetings.

SEC. 1. Stockholders' meetings may be called at any time by the board of directors, and on the requisition of the holders of one-fifth of the capital stock issued, it shall be their duty to call such meetings, for the purpose of amending this charter and consideration of any action upon all other business of the company, and all questions arising at such meetings shall be determined by a majority of the stock there present and voting.

SEC. 2. The annual meeting of the stockholders for the election of directors and transaction of the regular business shall be held on the second Wednesday in January of each year.

ARTICLE VI.

Liquidation.

This corporation may be dissolved at a general meeting convened for that purpose, with the assent of three-fourths of the stock of the company and two-thirds of the stock represented at such meeting;
and in case of such dissolution the liquidation shall be con-
86 ducted by three commissioners elected by ballot at such meeting. At the termination of this charter the liquidation shall be conducted by a similar board of three commissioners, to be in the same way elected at a general meeting of stockholders convened for that purpose.

Thus done and passed at my office, in the presence of Andrew J. Armstrong and John W. Hunter, lawful witnesses, residing in this city, who have hereunto signed their names as such, together with

the said appearers and me, said notary, on the day, month and year herein first written, after reading the whole.

(Original signed) G. W. R. BAYLEY.
J. A. GIRDNER.
GEO. JONAS.
JULIUS WEIS.
HUGH KENNEDY.
DAVID WALLACE.
E. B. WHEELOCK.
E. L. RANLETT.
JOHN H. KENNARD.
CYRUS BUSSEY.
JOHN PHELPS.
W. B. SCHMIDT.
SAM'L H. KENNEDY.

Witnesses:
A. J. ARMSTRONG.
JOHN W. HUNTER.

J. G. EUSTIS,
Notary Public.

I, the undersigned, deputy recorder of mortgages in and for the parish of Orleans, city of New Orleans, do hereby certify that the above and foregoing act of incorporation of the New Orleans Pacific Railway Company was this day duly recorded in my office, according to law, in Book 118, folios 626, 627, 628, 629, 630, 631 and 632.

New Orleans, June 29, 1875.

(Original signed) C. DARCANTEL,
Deputy Recorder.

I certify the above and foregoing to be a true and correct copy of the original charter and certificate of recordation thereof, now extant in my current register.

87 In faith whereof, I grant these presents under my hand and the impress of my official seal, this 3d day of July, A. D. 1875.

J. G. EUSTIS,
Notary Public, 35 *Carondelet Street.*

And whereas, it is important that the term of existence of said company should be extended, and that certain necessary franchises should be conferred on it; therefore,

SECTION 1. Be it enacted by the senate and house of representatives of the State of Louisiana in General Assembly convened, That the term of existence of the said New Orleans Pacific Railway Company be so extended that the said company, by its name and under the aforesaid-mentioned articles of incorporation, shall have perpetual succession.

SECTION 2. Be it further enacted, etc., That said New Orleans Pacific Railway Company be and the same is hereby authorized and empowered to enter upon, purchase, take and hold any lands that

may be necessary and proper for the construction and use of said railway, not exceeding one hundred feet on each side of its center line, together with such other lands and premises as may be required by said company for excavation or embankment or for turnouts, depots, station-houses, docks, wharves or other purposes in the conduct of the business of said railway, adequate compensation to be given to, or satisfactory settlement to be made with all owners of property so to be taken and used by said company; and the right of way is hereby granted to said New Orleans Pacific Railway Company through any and all lands belonging to the State of Louisiana, and through which said railroad may pass, to the distance of two hundred yards on each side of the center line of said railroad; and said company is authorized to enter upon any lands owned by the State of Louisiana, and adjacent to the line of said company's railroad, and take and remove therefrom, and appropriate to the uses of said company, any timber, earth or other material.

SECTION 3. Be it further enacted, etc., That the officers and servants of said company are hereby exempted from jury duty, and also from military duty, except in cases of insurrection and invasion.

SECTION 4. Be it further enacted, etc., That Shreveport, in Louisiana, shall be the northwestern terminus of said New Orleans
88 Pacific railway, and that the main line shall be completed to Shreveport before any branches are constructed.

SECTION 5. Be it further enacted, etc., That all laws or parts of laws, in any way conflicting with the passage of this act, be and are hereby repealed, and that this act shall take effect from and after its passage.

(Signed) E. P. ESTELETTE,
Speaker of the House of Representatives.

(Signed) C. C. ANTOINE,
Lieutenant Governor and President of the Senate.

Approved February 19th, 1876.

(Signed) W. P. KELLOGG,
Governor of the State of Louisiana.

A true copy.

P. G. DESLONDE,
Secretary of State.

89 No. 12.

An act to amend section eleventh of article three (3) of the charter confirmed by act number fourteen, eighteen hundred and seventy-six, entitled "An act to confirm the notarial charter of the New Orleans Pacific Railway Company, with amendments thereto; to extend the term of existence of said company, and to confer thereon certain powers," and to empower said company to mortgage all its future rights, properties, and franchises to secure its bonds.

SECTION 1. Be it enacted by the senate and house of representatives of the State of Louisiana, in General Assembly convened, That

section eleven of article three of the charter of the New Orleans Pacific railway, confirmed by act number fourteen, approved February the nineteenth, eighteen hundred and seventy-six, be amended and re-enacted so as to read (and the said company shall have power) "to borrow money, or to purchase or lease property on its own credit for the purpose of constructing and maintaining said railroad or establishing continuous and connecting lines as hereinbefore provided, and as evidence of the indebtedness of said company for such loans, or the purchase or lease of such property, to issue its corporate bonds or promissory notes, bearing interest at such rate per annum as the directory may elect, and made payable in gold, or the lawful money of the United States, and at such times and places as may be deemed most to the advantage of the corporation; and for securing the payment of said bonds, or notes, to mortgage its railroads, its capital stock, its corporate franchises as now existing, and also to mortgage in advance all such rights, titles, properties and franchises as the said company may hereafter acquire whether such property be real or personal, and whether in possession or not, or any portion of the same.

SECTION 2. Be it further enacted, etc., That all laws, or
90 parts of laws in conflict with the provisions of this act, in so far as they may conflict, be and are hereby repealed, and that this act shall take effect from and after its passage.

(Signed) LOUIS BUSH,
Speaker of the House of Representatives.

(Signed) LOUIS A. WILTZ,
Lieutenant Governor and President of the Senate.

Approved February 5th, 1878.

(Signed) FRANCIS T. NICHOLLS,
Governor of the State of Louisiana.

A true copy.

WILL. A. STRONG,
Secretary of State.

91 *Articles of Consolidation, New Orleans Pacific Railway Co. with the Texas & Pacific Railway Co., June 20th,* 1881.

This indenture, made this 20th day of June, in the year of our Lord one thousand eight hundred and eighty-one, by and between the New Orleans Pacific Railway Company, a corporation created by and under the laws of the State of Louisiana, party of the first part, and the Texas & Pacific Railway Company, a corporation created by and under the laws of the United States, and having and owning certain franchises under the laws of Texas, party of the second part:

Witnesseth, that the said party of the first part, for and in consideration of the sum of one hundred dollars, lawful money of the United States, to it in hand paid, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, and for the other and further consideration hereinafter to

be mentioned, hath consolidated itself with the party of the second part under its own proper and corporate name of "The Texas & Pacific Railway Company," on the terms and conditions herein and hereby agreed upon, by granting, bargaining, selling, aliening, remising, releasing, conveying and confirming, and by these presents granting, bargaining, selling, aliening, remising, assigning, transferring, conveying and confirming unto the party of the second part, its successors or assigns, all the franchises, corporate rights or privileges of the said party of the first part, together with its track, road-bed, buildings, rolling stock, engineers' tools,
92 bonds, stocks, grants, privileges, property, real and personal, and every right, title and interest in and to any franchises or property, real or personal, and all rights, of every name and kind which the party of the first part has any right, privilege or interest, situated and being in the State of Louisiana, or in the State of Texas, or elsewhere: The object and intent of this contract and agreement being to so merge the rights, powers and privileges of the party of the first part into the party of the second part, so that the party of the second part, under its own charter, corporate name and organization, shall, without impairing any existing right, exercise in addition thereto all the powers, rights, privileges and franchises, and own and control all the properties that the party of the first part now exercises and owns, or by its charter and by-laws it has the right to exercise, own or control.

Provided, however, that the land and land grants acquired or to be acquired by the party of the first part from the Government of the United States, either directly or indirectly, or from the State of Louisiana, or from the New Orleans, Baton Rouge & Vicksburg Railroad Company, or from any other source, other than lands necessary and needful for railway purposes, are expressly exempted and excluded from the provisions of this contract, and do not pass by any terms or provisions thereof.

And provided further, that the franchises of the party of the first part (to be and remain a corporation until such time as may hereafter be agreed upon for its dissolution) shall not be impaired or infringed upon by anything contained in this contract.

And provided, also, that nothing in this contract contained is intended to or shall impair any legally existing contract, by mortgage or otherwise, of the party of the first part.

The further consideration for this contract and agreement is, that the party of the second part shall receive from the party of the first part, or its shareholders, share for share of its capital stock of one hundred dollars per share, issued or to be issued (not exceeding the rate of twenty thousand dollars per mile, for 400 miles of road, which, it is estimated, will be constructed under the existing franchises of the party of the first part); that is to say: The party of the second part shall deliver to the party of the first part, or to such person as the latter shall direct, or to its stockholders,
93 one share of its capital stock of one hundred dollars per share, for a like amount of the capital stock of the party of the first part now outstanding, when and as transferred to the party

of the second part, and as further stock of the party of the first part is issued (not exceeding twenty thousand dollars per mile, as aforesaid) similar exchanges and transfers shall be made until all the stock of the party of the first part (not exceeding the rate per mile as aforesaid) shall have been issued.

Provided that the stock of the party of the first part received by the party of the second part in exchange, under this agreement, shall not be canceled, but shall be held and used by the party of the second part for the purpose of preserving to the said second party the enjoyment of all rights and privileges pertaining to the ownership thereof, until otherwise provided by authorized corporate action, the corporate existence of the party of the first part shall be maintained, and its power to carry out all existing contracts, and to mortgage any land grant it has acquired, or may acquire, from the New Orleans, Baton Rouge & Vicksburg Railroad Company or otherwise, remain wholly unimpaired hereby.

In witness whereof, the parties aforesaid, being the contracting parties of the first and second part, have mutually executed this indenture, under the corporate seals of the said companies, and attested by the signatures of the proper officers, the day and date above.

TEXAS & PACIFIC RAILWAY CO.,
[L. S.] By JAY GOULD, *President.*

Attest: C. E. SATTERLEE, *Secretary.*

NEW ORLEANS PACIFIC RAILWAY CO.,
[L. S.] By E. B. WHEELOCK, *President.*

Attest: WM. S. NICHOLSON, *Secretary.*

Recorded, and original filed in office of secretary of state of the State of Louisiana, June 28, 1881.

94 *City Ordinances—Official.*

MAYORALTY OF NEW ORLEANS,
CITY HALL, *November* 9, 1880.

(No. 6695, administration series.)

An ordinance granting to the New Orleans Pacific Railway Company or its assigns the right to establish its terminus within the city limits and to construct, maintain, and operate a railroad to and from such terminus, with one extension for passenger purposes and another for freight purposes, into and through certain streets and places in the city of New Orleans.

Be it ordained by the council of the city of New Orleans, that—

Whereas, the New Orleans Pacific Railway Company, a corporation organized and existing under Louisiana State laws, is vested with authority under an act approved February 19, 1876, as follows, to wit: "To locate, construct, lease, own and use a railroad, with

one or more tracks and suitable turnouts, of such gauge and construction and upon such a course or route as may be deemed by a majority of the directors of said company most expedient," and to and between the points and places mentioned and implied in said act, and is thereby authorized "to establish and maintain in the city of New Orleans proper freight and passenger depots," and to construct wharves, piers, warehouses, yards, depots and stations; and to "construct and maintain its said railroads or any part of the same, and to have the right of way therefor across and along or upon any street, highway, turnpike or canal in the State of Louisiana which the course of said railways may intersect, touch or cross: Provided, the said company shall preserve any street, highway, turnpike or canal which its said railways may so pass upon, along or intersect, touch or cross, so as not to impair its usefulness to the public unnecessarily;" and

Whereas, it is for the interest of the city of New Orleans that the southern terminus of said railroad shall be fixed and established within the city limits; and

95 Whereas, the said New Orleans Pacific Railway Company is desirous of constructing its line of road on the east bank of the Mississippi, from a crossing near Baton Rouge to some point in the city of New Orleans between the new canal and Melpomene street, and to establish its terminus at such point, on condition that the city shall grant to the company the right to extend its tracks from such terminus into and through Claiborne street to Canal street for passenger purposes; and shall also grant the right to extend its track from such terminus north of Claiborne canal by the most convenient and practicable route through the public streets to the river front for freight purposes, with the right to operate the same by steam or otherwise, as is now done on the Belt railroad on St. Joseph street, and on the levees by other railroad companies in the city of New Orleans;

Now, therefore, for the purpose of permanently securing to the city of New Orleans the advantages that will result from locating and maintaining the terminus of the said New Orleans Pacific railway within the city limits:

SECTION 1. Be it ordained by the council of the city of New Orleans, That the New Orleans Pacific Railway Company be and it is hereby authorized and empowered to locate, construct and maintain a railroad, with all necessary tracks, switches, turnouts, sidings and structures of every kind, convenient and useful and appurtenant to said railroad, upon lines and levels to be furnished by the city surveyor, to and from such point as shall be selected by such company as its terminus, between the new canal, Claiborne canal and Carrollton avenue, with the right to establish and maintain at such point necessary depots, shops, yards, warehouses and other structures convenient and useful for the transaction of its business, and to operate the same by steam or otherwise for the transportation of freight and passengers, within the city limits.

SEC. 2. Be it further ordained, That the said New Orleans Pacific Railway Company, or its assigns, be and they are hereby authorized

and empowered to locate, construct and maintain an extension of its railroad, with all necessary tracks, switches, turnouts, sidings, and structures of every kind, convenient and useful and appurtenant to said railroad, upon lines and levels to be furnished by the city surveyor, into and through Claiborne street to Canal
96 street, with the right to construct a passenger depot at or near the intersection of Claiborne street with Canal street; and to operate the same by steam or otherwise for the transportation of passengers; provided, that should it become necessary for the building of depot or laying of tracks to remove the Claiborne market, then the said New Orleans Pacific Railway Company obligate themselves to rebuild the same at their own expense on such lots to be purchased by the company as the city shall designate. The said market to be rebuilt under the supervision and instructions of the administrator of water works and public buildings.

SEC. 3. Be it further ordained, That the said New Orleans Pacific Railway Company, or its assigns, be and they are hereby authorized and empowered to locate, construct and maintain an extension of its railroad, with all necessary tracks, switches, turnouts, sidings and structures of every kind, convenient and useful and appurtenant to said railroad, upon lines and levels to be furnished by the city surveyor, across Claiborne canal, into and through such street as may hereafter be lawfully selected to the river front, with the right to extend its tracks through Front street, Water street and Pilie street, and along the river front between Julia and Jackson streets, connecting with the depots of the Louisville & Nashville Railroad Company, Morgan's Louisiana & Texas railroad, and the Chicago, St. Louis & New Orleans railroad, and to operate the same by steam or otherwise for the transportation of cotton, tobacco, grain, merchandise and other freight; or the said company may purchase, lease, control, maintain and operate, by steam or otherwise, any railway or railway tracks now existing in the streets of the city of New Orleans.

SEC. 4. Be it further ordained, That the right of way, franchises and privileges herein granted to the New Orleans Pacific Railway Company are granted only on condition and in consideration that the said grantees shall permanently establish the terminus of said road within the city limits, and maintain said terminus during the existence of the charter of said company, for which period said right of way and privileges shall last; and should the said company at any time hereafter abandon its said road on the east side of the Mississippi river and its terminus within the city limits, then this grant shall cease and terminate, and be without force or effect
97 from the date of such abandonment; and the further condition that all construction work within the city limits shall be executed under the direction and supervision of the city surveyor and completed to the satisfaction of the administrator of improvements and the administrator of commerce; and it is still further made a condition of this grant that said railway company shall complete its road from the crossing of the Mississippi river, at or near Baton Rouge, to its terminus in this city within two years from the promulgation of this ordinance.

SEC. 5. Be it further ordained, That the rights herein granted on Claiborne street shall apply only to a railroad for passenger purposes; that the rights to be granted from north of the Claiborne canal to the river front, and hereby granted along the river front and in parallel streets, shall apply to a railroad for freight purposes only, and shall not be used as a thoroughfare for the transportation of passengers without consent of this council.

Adopted by the council of the city of New Orleans, November 9th, 1880.

Yeas—Behan, Chevalley, Collins, Glynn, Isaacson, Marks.

I. W. PATTON, *Mayor.*

A true copy.

E. L. BOWER,
Acting Secretary.

City Ordinances—Official.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *December* 3, 1880.

(No. 6732, administration series.)

An ordinance supplemental to the ordinance No. 6695 (administration series), granting to the New Orleans Pacific Railway Company right of way for freight purposes through Thalia street.

Whereas, on the ninth day of November, 1880, the ordi-
98 nance No. 6695 (administration series) was duly adopted, granting to the New Orleans Pacific Railway Company, or its assigns, the right to establish its terminus within the city limits, and to construct, maintain and operate a railroad to and from such terminus; with one extension for passenger purposes and another for freight purposes, into and through certain streets and places in the city of New Orleans; and it was contemplated by said ordinance that a street should be duly selected whereby the said company should have its rights recognized to lay a track from Claiborne street to the river front through a street to be selected; now, therefore,

SECTION 1. Be it ordained by the city council of the city of New Orleans, That the New Orleans Pacific Railway Company, or its assigns, be, and it and they are hereby authorized and empowered to locate, construct and maintain an extension of its railroad, with all necessary tracks, switches, turnouts, sidings, and structures of every kind, convenient and useful and appurtenant to said railroad, upon lines and levels to be furnished by the city surveyor across Claiborne canal, into and through Thalia street, to the river front, and to operate the same by steam or otherwise for the transportation of cotton, tobacco, grain, merchandise and other freight; or the said company may purchase, lease, control, maintain and operate, by steam or otherwise, any railway or railway tracks now existing in the streets of the city of New Orleans; provided, that there shall

be but one track laid on Thalia street, from Claiborne to Water street.

SEC. 2. Be it further ordained, That the right of way, franchises and privileges herein granted to the New Orleans Pacific Railway Company are granted only on condition and in consideration that the said grantees shall permanently establish the terminus of said road within the city limits, and to maintain said terminus during the existence of the charter of said company, for which period said right of way and privileges shall last; and should the said company at any time hereafter abandon its said road on the east side of the Mississippi river and its terminus within the city limits, then this grant shall cease and terminate and be without force or effect from the date of such abandonment; and upon the further condition that the said company, at the time of laying their track upon Thalia street, shall pave said street, from Pilie street to Rampart street, including all intersections of said Thalia
99 street, with blocks of the best hard Boston granite, oblong in shape, not less than eleven inches and not more than fourteen inches in width, and not less than sixteen inches nor more than twenty-four inches in length, and from nine to ten inches in thick, ness; they shall be well quarried, having parallel sides and ends and the upper side free from lumps. The blocks adjoining the gutter-stones shall be cut at an angle of forty-five degrees with the sides, so as to be laid diagonally, and said pavement shall extend from curb to curb; and the said company shall at the time of laying their track pave with round or cobble-stone pavement, laying with gutter-stones the gutters of said street, from the end of the block paving at Rampart street to Claiborne street, with the privilege of using for the pavement the cobble-stones removed from that part of the street to be paved with square block—the rails to be laid in the pavement so that the top of the rails shall be flush with the surface of the pavement; and upon the further condition that said railway company shall at all times keep said pavement from curb to curb in repair; and the further condition that all construction work within the city limits shall be executed under the direction and supervision of the city surveyor and completed to the satisfaction of the administrator of improvements and the administrator of commerce; and it is still further made a condition of this grant that said railway company shall complete its road from the crossing of the Mississippi river, at or near Baton Rouge, to the terminus in this city, within two years from the promulgation of this ordinance.

SEC. 3. Be it further ordained, That upon the failure of said company to comply within three days with any notice of the department of improvements to repair any portion of the street or streets through which said company shall lay its tracks, they shall be fined twenty-five dollars for each and every day they fail to comply with said notice; said fine to be recoverable before any court of competent jurisdiction.

Adopted by the council of the city of New Orleans, December 3, 1880.

Yeas—Glynn, Isaacson, Marks.

Nays—Chevalley.

I. W. PATTON, *Mayor.*

A true copy.

ROB'T C. WOOD, *Secretary.*

100 MAYORALTY OF NEW ORLEANS,
CITY HALL, *March* 29, 1881.

(No. 6938, administration series.)

An ordinance amendatory of and supplementary to the ordinance No. 6695, administration series, passed November 9, 1880, and ordinance No. 6732, passed December 3, 1880, granting to the New Orleans Pacific Railway Company or its assigns the right to establish its terminus within the city limits, and to construct, maintain, and operate a railroad to and from such terminus, with one extension for passenger purposes and another for freight purposes, into and through certain streets and places in the city of New Orleans, and also with reference to and granting to said New Orleans Pacific Railway Company and its successors and assigns certain leasehold rights, and permission for wharves, warehouses, elevators, and sheds on the space, batture, and bank of the river in front of its property purchased or leased.

Whereas, the New Orleans Pacific Railway Company has purchased the road heretofore constructed under the charter of the New Orleans, Mobile & Texas Railroad Company, on the west bank of the Mississippi river, between Bayou Goula and Westwego, and with a view to maintaining and operating the said road in connection with and as a part of its through line to and from its terminus in New Orleans, designated in section 1 of ordinance No. 6695, administration series, passed on the ninth day of November, 1880; such line to cross the Mississippi river from a point at or near Westwego to a point on the east bank of the river in front of the Upper City park, late Foucher property, thence to extend by the best and most practicable route to the designated terminus, between the new canal, Claiborne canal and Carrollton avenue.

Now, therefore, for the purpose of securing to the city of New Orleans the advantages that will result from locating and permanently maintaining the terminus of the New Orleans Pacific railway within the limits of the city of New Orleans, as hereinbefore recited:

SECTION 1. Be it ordained by the council of the city of New Orleans, That the New Orleans Pacific Railway Company, or its assigns,
be and are hereby authorized and empowered to locate and
101 maintain a railroad with all necessary tracks, switches, turnouts, sidings and structures of every kind convenient, useful, and appurtenant to said railroad, from such point on the river front as its crossing from Westwego shall be located at, in the vicinity of

the Upper City park, along the western border of the said City park, and from thence by the best and most practicable route to its designated terminus east of Carrollton avenue.

SEC. 2. Be it further ordained, etc., That the city of New Orleans hereby agrees to lease unto the New Orleans Pacific Railway Company, its successors and assigns, for the period of ninety-nine years, and at the price of five hundred dollars per annum, payable annually in advance, all that strip or parcel of ground on the river front of said Upper City park, south of Tchoupitoulas street, or south of an extension of Tchoupitoulas street, in a westwardly direction, and between a prolongation of the east and west boundary lines of said park to the river, with all the batture formed thereon, or which may form during the term of said lease, with the right to establish and maintain upon said grounds such ferry facilities, wharves, piers, warehouses, yards, tracks, depots, stations, sheds, elevators and other structures, as shall be necessary and convenient for the transfer of cars, engines, passengers and freight, and in the transaction of its business. No vessel shall occupy or lie at such wharves without the consent of said company, its successors or assigns, and all vessels lying at and using said wharves with such consent, shall be exempt from the payment of levee or wharf dues to the city of New Orleans; the proceeds of such lease shall be applied by the city to the improvement of said park.

SEC. 3. Be it further ordained, etc., That the said New Orleans Pacific Railway Company, its successors and assigns, shall have the right to extend its tracks from the said ground so leased between the Upper City park and the river front, eastwardly along said river front to connect with the Belt road at Louisiana avenue, and to connect at Jackson street with tracks heretofore authorized to be constructed between Jackson and Julia streets by section 3 of ordinance 6695, administration series, adopted November 9, 1880, and by ordinance No. 6732, same series, adopted December 3, 1880, provided that between Louisiana avenue and Jackson street, the trains of said company shall be run only between sunset and sunrise
102 on said track, except in case of emergency and necessity beyond the reasonable control of the company.

SEC. 4. Be it further ordained, etc., That the said New Orleans Pacific Railway Company, its successors and assigns, shall have the right, and the same is hereby conferred for the term of its charter, and from and after the expiration of the existing lease of city wharves, to enclose and occupy for its purposes and uses, that portion of the levee, batture and wharf in the city of New Orleans in front of its riparian property, acquired or to be acquired, between Thalia and Terpsichore streets, and to erect and maintain thereon, at its own expense, such ferry facilities, wharves, piers, warehouses, elevators, yards, tracks, depots, stations, sheds and other structures as shall be necessary and convenient for the transfer of cars, engines, passengers and freight, and in the transaction of its business. No vessel shall occupy or lie at such wharves without the consent of the said company or its successors or assigns, or discharge or receive cargo thereat, and all vessels lying at or using said wharves by such

consent and on the business of the company, shall be exempt from the payment of levee or wharf dues to the city of New Orleans.

Said wharves and other structures shall be lighted and policed by said company at its own expense.

Any vessel lying at these wharves with the consent of the company, but not on its business, or not for the purpose of discharging or receiving freight or passengers to or from said company as a carrier, shall be liable to the city for usual wharf or levee dues.

Any vessel using said wharf to receive any freight not coming to or going from said company as a carrier, shall pay usual wharfage dues to the city.

In consideration of the permission herein given, the company will build three hundred feet of new wharf at such point between Terpsichore and Jackson streets, for the city, as the administrator of commerce may indicate, and will pave Pilie street between Thalia and Terpsichore streets, and Terpsichore street between Pilie and Front streets with square blocks of granite or with blocks of compressed asphalt, and keep the same in good order.

The rights conferred by this section shall not be held to interfere with the rights of the city to police any part of the river front.

103 SEC. 5. Be it further ordained, etc., That the mayor be, and he is hereby, authorized and directed to enter into a proper notarial contract of lease for the purpose of carrying out the provisions of the second section of this ordinance.

SEC. 6. Be it further ordained, etc., That the right of way, franchises, and privileges herein and heretofore granted to the New Orleans Pacific Railway Company are and were granted on condition and in consideration that the said grantee shall permanently establish its terminus within the city limits, and shall maintain said terminus during the existence of the charter of said company, for which period the said franchises, rights of way, grants and privileges shall last and continue; and should the said railway company, at any time hereafter, remove its terminus from within the city limits, then this grant shall cease and determine and be without force and effect from the date of such removal; and the further condition that the construction work within the city limits shall be executed under the direction and supervision of the city surveyor, and completed to the satisfaction of the administrator of improvements and the administrator of commerce; and the further condition that said railway company shall construct or control a line of road, ready for public use, from a crossing of the Mississippi river to its designated terminus in this city, within two years from the promulgation of this ordinance.

Adopted by the council of the city of New Orleans, March 29th, 1881, the veto of the mayor to the contrary notwithstanding.

Yeas—Fagan, Fitzpatrick, Guillotte, Huger, Walshe.

Nays—Delamore, Mealey.

A true copy.

M. McNAMARA, *Secretary.*

MAYORALTY OF NEW ORLEANS,
CITY HALL, *July 11th*, 1882.

(No. 7946, A. S.)

An ordinance, supplementary to ordinances 6695, 6732, and 6938, administration series, granting certain rights to the New Orleans Pacific Railway Company and its assigns, and providing for the selection of a site for the Claiborne market.

Whereas, by section 2 of ordinance 6695, administration
104 series, a right was given to the New Orleans Pacific Railway Company, or its assigns, to locate, construct and maintain an extension of its railroad through Claiborne street, with a right to construct a passenger depot on the neutral ground of Claiborne street, at or near the intersection of Claiborne street with Canal street, with a proviso that, should it become necessary for the building of the depot or laying tracks to remove the Claiborne market, then the New Orleans Pacific Railway Company or its assigns should rebuild the same at their own expense, on such lots as the city shall designate; and

Whereas, by ordinances Nos. 6732 and 6938, administration series, certain rights have also been granted to said company and its assigns, with reference to the said Claiborne street and to Thalia street, and the company has built its road from Baton Rouge to New Orleans, crossing at Thalia street, and established its terminus in the city limits at Thalia street and the levee, and is preparing also to cross from Westwego to the City park and thence to Claiborne street; now, therefore,

SECTION 1. Be it ordained by the council of the city of New Orleans, That the administrator of improvements, the administrator of commerce, and the administrator of water works and public buildings be, and they are hereby, authorized and directed, within sixty days from the passage of this ordinance, to select such lots as may be needful and proper for a new site for said market; and when such selection shall have been made they shall deposit a process verbal thereof in the office of the administrator of water works and public buildings.

SEC. 2. Be it further ordained, That whenever said company or its assigns shall find it necessary to remove said building, it shall be rebuilt on said lots so selected, and as prescribed in said original ordinance.

SEC. 3. Be it further ordained, That in crossing the new canal under its charter, and according to the said ordinances, the said railway company, or its assigns, shall do so by means of a proper draw-bridge.

Adopted by the council of the city of New Orleans, July 11th, 1882.

JOS. A. SHAKSPEAR, *Mayor.*

A true copy.
GEO. W. FLYNN, *Secretary.*

105 NOTE.—January 1st, 1890. The following ordinances passed by the city council of New Orleans, repealing certain rights and privileges heretofore granted in ordinances Nos. 6695, 6732 and 6938, are now being contested in the courts, the company claiming that it is not in default.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *April 24th*, 1884.

(No. 685, council series.)

An ordinance repealing certain sections of the ordinance No. 6938, A. S., granting privileges to the New Orleans Pacific Railway Company.

Be it ordained, That section two (2) of the ordinance No. 6938, A. S., passed March, 1881, granting to the New Orleans Pacific Railway Company a lease of the Upper City Park batture property, be and the same hereby is repealed and revoked.

Adopted by the council of the city of New Orleans, April 15th, 1884.

M. McNAMARA,
Clerk of Council.

Approved April 24th, 1884.

W. J. BEHAN, *Mayor.*

(Copy.)

MAYORALTY OF NEW ORLEANS,
CITY HALL. *June 16th*, 1886.

(No. 1828, council series.)

An ordinance repealing certain rights granted to the New Orleans Pacific Railway Company under ordinance No. 6695, A. S., adopted November 9th, 1880, No. 6732, A. S., adopted December 3d, 1880, No. 6938, adopted March 29th, 1881, No. 7946, adopted July 11th, 1882; and

Whereas, the city of New Orleans granted to the Pacific Railway Company the right to extend its tracks through Claiborne street to Canal, to erect a passenger depot on Claiborne street, near Canal street, construct tracks from Claiborne street to and through Thalia street to the river; and

Whereas, the original grantee company has merged its identity with that of an alien corporation which itself is now in the hands of a receiver appointed on the prayer of an alien corporation; and

Whereas, such rights were granted on various conditions which have not been complied with, and the delay for so doing has elapsed; and

Whereas, by the acts of said New Orleans Pacific Railway Company, such rights have been abandoned, and it is necessary for the public good that Claiborne street between Common street and the

old basin, shall be used for steam and horse railway and depot purposes;

Therefore, be it ordained by the council of the city of New Orleans that all rights of way on Claiborne street, rights to establish a passenger depot on said street, and rights to connect any steam or other railway by the New Orleans Pacific Railway Company through or on Claiborne street, or to erect any depot thereon, whether acquired through or by the ordinances above enumerated, or through or by any other ordinance of the council of the city of New Orleans, be and the same are hereby repealed and revoked.

Adopted by the council of the city of New Orleans, June 8th, 1886.

W. H. MICHEL,
Assistant Clerk of Council.

Approved June 16th, 1886.

D. M. KILPATRICK,
Mayor pro Tem.

106 Agreement as to omission of acts of mortgage referred to in note of evidence as "Trust Co. One," "Trust Co. Two," and other sundry documents. Filed June 27, 1891.

TEXAS & PACIFIC RAILWAY COMPANY
vs.
CITY OF NEW ORLEANS. } No. 11397.

In making up the transcript of record for the Supreme Court of the United States it is agreed that the clerk may omit the copy of mortgage made by the New Orleans Pacific Railway Company to the co-complainant, The Fidelity Insurance, Trust, and Safe Deposit Company, as well as the mortgage thereafter made by the Texas & Pacific Railway Company to the same co-complainant, and it is conceded that said mortgages are respectively made to secure bonds exceeding five millions of dollars and cover the rights given by the ordinances set forth in the bill of complaint as therein stated.

And sundry other documents having been omitted from the transcript for the purpose of reducing bulk and expense, it is agreed that copies of such omitted papers, including said mortgages, may at any time be brought up and filed with the record without certiorari.

(Signed) W. W. HOWE,
For Complainants.
FRANCIS B. LEE,
For Defendant.

107 *Testimony of Edward B. Wheelock, Taken by Consent, Marked "E. B. W. 2." Offered by Complainant Feb'y 24, 1891.*

TEXAS & PACIFIC RAILWAY COMPANY
vs.
CITY OF NEW ORLEANS. } No. 11397.

Additional testimony of E. B. Wheelock, recalled Jan. 15, 1891.

E. B. WHEELOCK, recalled, further states:

The recitals of the ordinance of the city of New Orleans, No. 7946, A. S., July 11, 1882, are correct as a matter of fact. The terminus therein referred to as having been established in the city limits was established prior to July, 1882, by the New Orleans Pacific Railway Company, as stated, and conveyed to the Texas & Pacific Railway Company by consolidation. The Texas & Pacific Railway Company went into actual possession about September, 1882, and has maintained this terminus, which is a permanent one, in the city at that point ever since. The terminals there are very large and valuable, and are assessed for taxation at $612,000.00.

The New Orleans Pacific railway constructed and controlled a line of road ready for public use from a crossing of the Mississippi river to its said designated terminus in this city within two years from Nov. 4, 1880, and March 29, 1881, and prior to July, 1882. The road has been open to public use and operated ever since by the New Orleans Pacific Railway Company and its assigns and transferee, the Texas & Pacific Railway Company. It may be briefly
108 described as extending at that time and now from the Thalia-street terminus to New Orleans, where it has a large number of tracks, thence to the crossing of the Mississippi river from Thalia and Terpsichore streets; thence to Gouldsboro', on the right bank of the river, by transfer boats, on which the cars are crossed; thence to Baton Rouge Junction and Baton Rouge, and from Baton Rouge Junction on to Shreveport and El Paso, Texas.

The railroad so constructed and completed in 1881 and July, 1882, has been operated ever since. Though it was out of repair somewhat when Mr. Pitkin's report was made in the receivership suit, No. 11181, it was repaired by the receivers and restored by the court to the complainant company in October, 1888.

It was always maintained as a railroad, and, though it was out of repair at the time of Mr. Pitkin's report, was always operated, and was put in repair and restored to the company when the receivership terminated in 1888.

As a matter of fact, the strip or parcel of ground leased by section 2 of the ordinance No. 6938, A. S., is accretion or batture outside of the River road, or Tchoupitoulas street, in front of the Upper City park, now called Audubon park. The public levee extends along the outer edge of this Tchoupitoulas street, or the River road, and the said strip or parcel is outside of the public

levee. It is covered by water at high water, and can only be utilized by being filled up.

(Signed) E. B. WHEELOCK.

Testimony of Robert Strong, Taken by Consent Jan. 7, 1891, *Marked R. S.* "1." *Offered Feb'y* 24, '91.

109 TEXAS & PACIFIC R'Y CO. *vs.* CITY OF NEW ORLEANS. } No. 11397.

Testimony of Robert Strong, for complainants.

ROBERT STRONG, sworn for complainants, says:

I reside in New Orleans, and have done so for upwards of thirty-five year; have been employed in the executive departments of the New Orleans Pacific Railway Company and Texas & Pacific Railway Company for upwards of nine years, and have much familiarity with the facts of this case.

The recitals of the ordinance of the city of New Orleans No. 7946, A. S., July 11, 1882, are correct as matter of fact. The terminus therein referred to as having been established in the city limits was established prior to July, 1882 (about March, 1882), by the New Orleans Pacific Railway Company, as stated, and conveyed to the Texas & Pacific Railway Company by the consolidation. The Texas & Pacific Railway Company went into actual possession about September, 1882, and has maintained this terminus, which is a permanent one, in this city ever since. The terminals there at Thalia street and the river are very large and valuable, and are assessed for taxation at $612,000.

The New Orleans Pacific Railway Company constructed and controlled a line of road, ready for public use, from a crossing of the Mississippi river to its said designated terminus in this city within two years from March, 1881, and prior to July, 1882. The road has been open to public use and operated ever since by the New Orleans Pacific and its assigns and transferee, the Texas &
110 Pacific Railway Company. It may be briefly described as extending, at that time and now, from the Thalia-street terminus in New Orleans, where it has a large number of tracks; thence to the crossing of the Mississippi river from Thalia and Terpsichore streets; thence to Gouldsboro', on the right bank of the river, by transfer boats, on which the cars, engines, &c., are crossed; thence to Baton Rouge Junction and Baton Rouge, and from Baton Rouge Junction on to Shreveport and El Paso, Texas.

As a matter of fact, the strip or parcel of ground leased by section 2 of the ordinance No. 6938, A.S., is accretion or batture outside of the River road or Tchoupitoulas street, in front of the Upper City park, now called Audubon park. The public levee extends along the outer edge of this Tchoupitoulas street or the River road, and the said strip or parcel is outside of the public levee. It is

covered by water at high water and can only be utilized by being filled.

(Signed) ROB'T STRONG.

Sworn to and subscribed before me on this 23 day of January, A. D. 1891.

[L. S.] (Signed) J. G. EUSTIS, *Not. Pub.*

111 Sketch of the batture in front of the Upper City park, marked "Batture 1." Offered Feb'y 24, 1891.

(Here follows diagram marked p. 111.)

112 *Certificate of Recorder of Conveyances Showing Title of Park Commissioners to Upper City Park, Marked "Batture 2." Offered Feb'y* 24, 1891.

(Stamps.) CONVEYANCE OFFICE,
PARISH OF ORLEANS, CITY OF NEW ORLEANS.

A. J. Villeré, register.

By act passed before M. L. Ainsworth, notary (acting for and representing P. C. Cuvellier, also a notary, absent by executive authority), dated 15th August, 1871—

Messrs. Malek A. Southworth and Robert Bloomer, of this city, by Camille E. Girardey, of this city, acting in their name and behalf as the agent and attorney-in-fact of Robert Bloomer and Mrs. Eliza Newton Ledler, his wife.

And the said Camille E. Girardey, herein acting in his own name as well as on behalf of the firm of C. E. Girardey & Co., composed of himself, Thomas L. Macon, and Nicholas I. Hoey, declared that for the price and sum hereinafter expressed they have sold, under all warranties of law and with substitution and subrogation to all their said Southworth, Bloomer, and Girardey & Co. rights, title, claims, and actions of warranty against their vendors and the vendors or the authors of their vendors, unto the commissioners of the New Orleans park, a body corporate created by an act of the legislature of this State (being act No. 83 of the session of 1871), the following-described property, to wit:

That certain tract of land situate in the 6th district bounded by the Mississippi river, the middle of Nayades street (or St.
113 Charles avenue), the lower line of Greenville, and upper line of Burtheville, containing about three hundred and seventy arpents, more or less, in superficies, having, French measure, *measure* the following stated dimensions, viz: A width and front on a line in the middle of the public road of 2,259′ (or 12 arpents) and 99′; then on the upper boundary of said tract or lower line of Greenville 5,062′ 2″ from the middle of the public road to the middle of St. Charles avenue; then on the lower boundary of said tract or upper line of Burtheville 5,364′ 11″ from said middle of the public

road to said middle of St. Charles avenue, with all the rights of batture, ways, privileges, servitudes, &c.

The measurement above given, in conformity with a plan or diagram made and signed by J. A. D'Hemecourt, 8th March, 1870, annexed to and made part of the inventory of the estate of Louis F. Foucher (Marquis de Cercé), taken by F. J. Luizer, N. P., 12th March, 1870, a copy of which inventory is on file in the 2d district court, No. 33781 of the docket of said court.

Which said herein-conveyed tract of land belonged to the present vendors in the proportion of five undivided sixths (5/6) to said Southworth and one undivided sixth (1/6) to said Bloomer, by means of the purchases which they jointly made of a larger tract from Mrs. Marie Marguerite F. Burthe (widow of said late L. F. Foucher, Marquis de Cercé), and Mrs. Aline Delachaise (wife of F. Dugée), by act before E. Gottschalk, N. P., 6th May, 1871 (registered in the conveyance office, in Book 99, folio 556, and Book 91, fo. 548, in mortgage office), and by act passed 12th August, 1871, before M. T. Ducros, representing E. Barnett, notaries, registered in the conveyance office, B'k 100, fo. 175, the said M. A. Southworth sold 5/6 (or 1/3) of his, said Southworth, interest in said property to E. E. Girardey & Co.

114 This sale was made for $800,000 (eight hundred thousand dollars), paid and payable as follows: ($65,000) sixty-five thousand dollars cash, paid by the purchasers, — also assume and bind themselves (as a corporate body) to take up and pay in lieu and stead of said Southworth with Bloomer those 20 several promissory notes made by said Southworth & Bloomer each for $27,000 (as seen more fully recited and described in the mortgage office, 91, folio 548, and in this conveyance office, Book 99, folio 556), for reference; and in final liquidation and settlement of the balance of said price the purchasers have made and delivered 195 bonds, dated 1st September, 1871, numbered from 1 to 195, both inclusive, in the sum of $1,000 each, payable to the said C. E. Girarday, or bearer, 10 years from the date thereof, and bearing interest at 8%, payable semi-annually, on the 1st day of March and September of each year, at the Citizen's Bank of La., said interest evidenced by interest coupons attached to said bonds falling due and being payable according to the tenor thereof, issued according to law and signed by the president and secretary of said board.

The purchasers to pay the taxes due on the property as described, set forth, and assumed by Southworth and Bloomer in their act of purchase—city, State, and draining taxes unpaid.

New Orleans, August 16th, 1871.

(Signed) C. B. FISH, *D. R.*

B. 100, 180.

I certify the foregoing to be a true and correct copy of an inscription made in this office in B'k 100, fo. 180.

New Orleans, Jan'y 19th, 1891.

[L. S.] (Signed) A. BUISSON,
Deputy Register.

115 Copy of petition, supplemental petition, and citation in case of City of New Orleans *vs.* New Orleans Pacific Railway Company, No. 14619, civil district court, parish of Orleans, which suit is still pending, marked "14619." Offered Feb'y 24, 1891.

To the honorable the judges of the civil district court for the parish of Orleans:

The petition of the city of New Orleans, a municipal corporation duly created by law, respectfully represents—

That your petitioner, by virtue of authority conferred upon her by law, did, in November, 1880, enact ordinance No. 6695, administration series, granting to the "New Orleans Pacific Railway Company or its assigns the right to establish its terminus within the city of New Orleans, and to construct, maintain, and operate a railroad to and from such terminus, with one extension for passenger purposes and another for freight purposes, into and through certain streets and places in the city of New Orleans," and subsequently, on December 9th, 1880, enacted ordinance No. 6732, A. S., which ordinance was supplemental to said ordinance No. 6695, and granted and fixed additional privileges, rights, and franchises to said New Orleans Pacific Railway Company, to wit, fixing and selecting a street whereby the company should have its rights recognized to lay a track from Claiborne street to the river front, by virtue whereof authority was given said company to construct and maintain an extension of its said railway through Thalia Str. to the river front, in consideration of which the said company
116 agreed to pave said Thalia Str., and again subsequently, on March 29th, 1881, by ordinance No. 6938, A. S., your petitioner granting further privileges and rights to said company which were accepted and availed of by it, viz., the right to occupy and use the levee batture and wharf in front of the city's riparian property for the term of its charter, and to erect and establish thereon ferry facilities, wharves, piers, elevation, yards, tracks, depots, etc., to use the same with charge or costs for its own purposes, and to land freight, unload vessels, and to prohibit other vessels from so lying, unloading, etc.

In consideration whereof the said company agreed and bound itself, among other things, to pave Pilie street between Thalia and Terpsichore streets and Terpsichore street between Thalia and Front streets with square blocks of granite, and to keep the same in good order; all of which will appear by reference to said ordinances No. 6695, A. S., No. 6732, A. S., No. 6938, A. S., hereto annexed and for greater certainty made part of this petition.

Now, your petitioner avers that notwithstanding all the foregoing facts and circumstances the said railway has failed to comply with any of the provisions and agreements made by them, and particularly as regards the said paving as above set forth; that, in accordance with a resolution of the council of the city of New Orleans, the city surveyor did, on Nov. 21st, 1884, formally notify said railway Co. to commence within six weeks to pave Pilie St. and Terp-

sichore, as will more fully appear by reference to said notice hereto annexed and marked "A," and again said company was notified to the same effect by the city attorney on January 12th, 1885, but without avail, and your petitioner was compelled upon said default of said company to do said work which it has done
117 and is doing upon the most reasonable terms and conditions and in strict compliance with its terms of agreement with said company; that the work is of great magnitude and requires and has required a large outlay and the incurring of great expense, and, as usual and proper, said work is to be paid in installments upon the completion of certain specified and subject to the approval of the city surveyor and commissioner of public works that the following work has been done:

272 superficial yards of square-block paving on Pilie street between Thalia and Terpsichore streets	$1,564 00
30 superficial feet of curbing	255 00
Making a total	$1,819 00
And an additional 264 sup'l yards of square-block paving on Terpsichore St.	$1,518 00
345 sup'l feet of curb	293 25
Making	$1,811 25

This making a total of three thousand six hundred and thirty $\frac{25}{100}$ dollars due by said railway company to your petitioner, all which will appear by reference to said bills marked "B" & "C," hereto annexed and made part of this petition, and petitioner is entitled to judgment for said amount.

Wherefore your petitioner prays that the said New Orleans Pacific Railway Company, a corporation created under the laws of this State and having its domicile in the city of New Orleans, be duly cited through its proper officer, and that, after due proceedings had, your petitioner have judgment against the New Orleans Pacific Railway Company for three thousand six hundred and thirty $\frac{25}{100}$ dollars, with legal interest from judicial demand, all costs, and for general relief.

(Signed) W. H. ROGERS, *City Att'y.*

118 To the honorable the judges of the civil district court for the parish of Orleans:

The supplemental and amended petition of the city of New Orleans respectfully shows—

That your petitioner reiterates and affirms each and every allegation set forth in the original petition; that, as therein set forth at the time of instituting same — your petitioner, a sum of three thousand six hundred and thirty $\frac{25}{100}$ dollars was due by petitioner for the work therein set forth and under the terms and conditions as set forth in his original petition. Now your petitioner avers that she has paid — sum of five thousand six hundred and thirty $\frac{25}{100}$

dollars, and in addition thereto the sum of $9,831.00, which will more fully appear by reference to the annexed exhibits, made part hereof and marked one, two, three, four, and five.

That all of said payments were made for and in consideration of the premises set forth fully in the original petition, which is now again asserted and adopted.

Wherefore your petitioner prays permission to file this supplemental and amended petition; that due service hereof be made and your petitioner authorized to amend its prayer for a judgment for a decree in its favor for thirteen thousand four hundred and sixty-one $\frac{25}{100}$ dollars ($13,461.25), with legal interest from judicial demand, and for which judgment in its favor and against the New Orleans Pacific Railway Company, to wit, the sum of thirteen thousand four hundred and sixty-one $\frac{25}{100}$ dollars, with legal interest from judicial demand, with costs, your petitioner prays, and
119 for general relief.

(Signed) W. H. ROGERS, *City Att'y.*

Let this supplemental and amended petition be filed as within prayed for and according to law.

New Orleans, Dec. 14, 1888.

(Signed) N. H. RIGHTOR, *Judge.*

A true copy.

Clerk's office, New Orleans, Dec. 14th, 1888.

[L. S.] (Signed) TH. BUISSON, *D'y Cl'k.*

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, in the City of New Orleans.

CITY OF NEW ORLEANS
versus
NEW ORLEANS PACIFIC RAILWAY COMPANY. } No. 14619.

The New Orleans Pacific Railway Company, through E. B. Wheelock, president, New Orleans:

You are hereby summoned to comply with the demand contained in the amended and supplemental petition, of which a copy accompanies this citation, or deliver your answer to the same in the office of the clerk of the civil district court for the parish of Orleans within ten days after the service hereof.

Witness the Honorables F. A. Monroe, N. H. Rightor, A.
120 Voorhies, T. C. W. Ellis, F. D. King, judges of the said court, this 14th day of December, in the year of our Lord 1888.

[L. S.] (Signed) TH. BUISSON,
Deputy Clerk.

Documents Referred to in Testimony of W. W. Howe, Esq. Offered Feb'y 24, 1891.

Letter of Kennard, Howe & Prentiss to D. M. Brosnan, city surveyor, marked K. & B.

NEW ORLEANS, *May 9th*, 1883.

D. M. Brosnan, Esq., city surveyor.

DEAR SIR: We are requested by E. B. Wheelock, Esq., president of the New Orleans Pacific Railway Company and representing the Texas and Pacific Railway Company, to say that he is now ready to lay track from Louisiana avenue to Jackson street under the rights conferred by section 3 of ordinance No. 6938, A. S. You have already given the larger portion of the levels contemplated by that section and the ordinances therein referred to, and it is now needful to have those from Louisiana Ave. to Jackson St.

It is of great importance that they be given with as little delay as possible, and we are therefore compelled to make this formal demand. We trust that it may not be necessary to take any legal proceedings in such a matter, but we are instructed to do so if necessary. We should also point out that delay in such case will entail great pecuniary loss to these companies, and that you and your sureties would be held in law liable for any loss which
121 might result from your failure to perform your official duty.

We would thank you for a prompt answer to this communication.

Very respectfully,
(Signed) KENNARD, HOWE & PRENTISS.

Letter of D. M. Brosnan, City Surveyor, to Kennard, Howe & Prentiss, Marked "K. H. P."

NEW ORLEANS, *May* 9, 1883.

To Messrs. Kennard, Howe & Prentiss, attorneys for the New Orleans Pacific Railway Company.

GENTLEMEN: Your communication just received, and in accordance with your request I promptly answer that there is no intention or desire on my part to delay locating the right of way of the Pacific Railway Co. in accordance with all of its ordinances. To locate the right of way between Louisiana avenue and Jackson street necessitates the actual location of the "New Orleans Belt" track, which, when located, will give the sufficient data to rightly locate the N. O. P. on chart. The location of the N. O. P. obliges the movement of the Belt Railroad track from two to six feet, riverward or woodward. This survey will require some days, and as this is not the only duty calling on me, but is one of about two dozen public calls, at present it must wait its turn for action.

Very respectfully, &c., D. M. BROSNAN,
City Surveyor.

Addendum.—If the N. O. P. Company is ready at any time
122 to start construction, all that is necessary is for said company to notify me when I will locate actual position on the ground in advance of the workmen from time to time as the construction progresses. This mode of procedure is what is always done and believe this should be satisfactory.

I am astonished and surprised at the uneasiness shown on this subject.

Respectfully, &c., D. M. BROSNAN,
City Surveyor.

Letter of Kennard, Howe & Prentiss to B. T. Walshe, City Treasurer, Marked K. & W.

NEW ORLEANS, *March 26th*, 1884.

Hon. B. T. Walshe, city treasurer, N. O.

DEAR SIR: In addition to the sums heretofore paid for rent of batture in front of the Upper City park, under section 2 of ordinance No. 6938, A. S., we tender you herewith in lawful money the sum of $500 for rents of the same property for 1883–'4.

Very respect-y yours,

(Signed) KENNARD, HOWE & PRENTISS,
(*For T. & P. R'y Co.*)

Tendered by W. W. H. in $500 U. S. Treasury note for N. O. P. and T. & P. this date.

March 26, 1884.

123 *Letter of E. B. Wheelock, President of N. O. P. R'y Co., to the Mayor and Administrators, Marked E. B. W.*

(Copy.)

NEW ORLEANS, LA., *March* 31, 1881.

To the hon. mayor & administrators of the city of New Orleans.

GENTLEMEN: I have the honor to enclose a copy of a resolution of the board of directors of the New Orleans Pacific Railway Company accepting the grant made by the ordinance No. 6938, A. S., adopted March 29th, 1881, and to state that I am ready to enter into the notarial lease provided for in such ordinance.

In view of the desire of the company to prosecute its work with speed, I would also take leave to suggest the appointment of a committee to fix the lines of connection between the batture in front of the park and Jackson street, and also between that batture and Claiborne street.

Very respectfully, your obedient servant,

(Signed) E. B. WHEELOCK, *President.*

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

Resolution Referred to in Letter of E. B. Wheelock, President, to Mayor, &c., Marked "N. O. P."

Resolution of the board of directors of the New Orleans Pacific R'w'y, passed on the 30th day of March, 1881.

Resolved, "That the ordinance adopted by the city council
124 of New Orleans on the 29th March, 1881, with reference to this company and which will be known as No. 6938, A. S., and the rights conferred and grants made thereby, be, and the same hereby are, accepted by this company, and that the president be, and hereby is, authorized to enter into any notarial lease or other act and to sign any other writings necessary to effect or secure the purposes of said ordinance."

125 Plan marked "Exhibit P," referred to in supplemental bill. Filed Feb'y 3, 1887.

(Here follows diagram marked p. 125.)

126 Soard's official & railroad map of New Orleans. Offered by complainants and filed Jan'y 24, 1891.

(Here follows map marked p. 126.)

Map marked "T. & P., offered by complainants and filed Oct'r 15, '89; to be carried up and filed with this transcript.

127 *Defendant's Offerings.*

Testimony of B. M. Harrod and D. M. Brosnan, marked "R. No. 1." Offered Feb'y 24, 1891.

United States Circuit Court in and for the Fifth Judicial Circuit and Eastern District of Louisiana.

TEXAS & PACIFIC RAILWAY COMPANY
vs.
THE CITY OF NEW ORLEANS. } No. 11397.

Testimony taken on behalf of respondent in the above-entitled case, by consent of parties, before T. Wharton Collens, notary public and short-hand reporter; subject to all objections except as to manner, form, and time of taking.

NEW ORLEANS, *October 11th*, 1889.

Present: W. W. Howe, solicitor for complainant; Francis B. Lee, assistant city attorney, solicitor for respondents.

Counsel for respondent offers in evidence a certified extract from a certain copy of a plan made by the late Joseph Pilié from an orig-

inal plan drawn by said Joseph Pilie on the 1st of May, 1840, and deposited in the office of D. L. McCay, late notary public, the correctness of said plan being certified to by Edgar Pilié, son of the late Joseph Pilié, in whose possession is a copy of the original plan; also his certificate at the bottom of said map; which it is agreed shall stand in lieu of his testimony as to the facts thereon stated, said plan being now marked "R. No. 1."

128 Counsel for respondent offers in evidence a certificate by A. J. Villere, register of conveyances for the parish of Orleans, dated 7th of October, 1889, showing the fact that John Hagan and George Washington Louis Gilbert Dumottier De Lafayette and wife made transfers of certain pieces of property on both sides of Claiborne street in this city, between Canal & Common, as shown by the map by Pilié, just offered in evidence and marked "R. No. 1," and said certificate being marked "R. No. 2."

Also offers in evidence act No. 7 of the extra session of the legislature of Louisiana of 1870, being the charter of the city of New Orleans in force up to the year 1882; also act No. 48 of the year 1871, amending said act No. 7 of the extra session of 1870, and especially section 7 of said act No. 48 of 1871, amending subdivision 13 of section 12 of act 7 of E. S., 1870.

(Objected to by solicitor for complainant.)

Counsel for respondent offers in evidence the original bill for receiver in the proceedings, No. 11181 of the docket of the circuit court of the United States for the eastern district of Louisiana, entitled Missouri Pacific Railroad Company *vs.* The Texas & Pacific Railway Company, and answer thereto; also report of the master appointed in that case as to the condition of the Texas & Pacific Railway Company.

(Counsel for complainant objects to the report of the master as irrelevant.)

Counsel for respondent offers in evidence part of the ordinance relative to the Belt Railroad Company, marked "R. No. 3."

(Counsel for complainant reserves an objection that this evidence is irrelevant.)

129 Counsel for respondent offers in evidence the record in the proceedings, No. 8825 of the docket of the civil district court for the parish of Orleans, entitled State *ex rel.* New Orleans and Pacific Railroad Company *vs.* D. M. Brosnan, city surveyor, *et al.*, especially the map in said record marked "E" and certain letters and correspondence which passed between Col. Wheelock, representing the plaintiff company, and the defendant Brosnan in regard to lines and levels.

B. M. Harrod, sworn for respondents, says:

Direct examination by Mr. Lee:

Q. What is your official position in the city government of the city of New Orleans now?

A. City surveyor.

Q. Did you make, at my request, a map showing the rights con-

veyed by the city of New Orleans to the New Orleans and Pacific Railway Company under ordinances 6695, A. S., approved November 9th, '80; 6732, A. S., approved December 3rd, '80, and 6938, A. S., approved March 29th, 1881?

A. Yes, sir.

Q. Can you produce such a map?

A. Yes, sir. This is the map I made. (Witness produces a map, marked "R. No. 4," as the map which he made at the solicitation of counsel.)

NOTE.—It is agreed between counsel for the parties in this case that all testimony this day taken is taken subject to all legal objections to be made upon argument, except as to the manner and form of taking, and such objections may be made upon the hearing of the cause without any motion to suppress.

130 Q. Does the map that you have in your hand, Major, show the city of New Orleans from Canal street or Canal avenue to the upper limits of the city? (Map R. No. 4 shown to witness.)

A. Yes, sir; such parts of it as are concerned with the rights of the railroad.

Q. But the streets on the river front along the left bank of the river are all shown, are they not?

A. Yes, sir.

Q. Though they are not continued out in the rear of the city because you didn't deem it necessary for the purposes of this case to make that showing?

A. Yes, sir.

Q. Does this map show the rights conveyed under ordinance 6695 of 1880?

A. Yes, sir.

Q. It shows the track through Claiborne street from the terminus described in the ordinance that was to be established by the rail'd?

A. That is an explanation I want to make. They have a right to locate tracks from a terminus bounded by Claiborne street, the new canal, and Carrollton avenue, but it has never been definitely located within that area.

Q. Then the lines you have given under ordinance 6695 down Claiborne street has been simply a line down Claiborne street without undertaking to connect it with any terminus?

A. Yes, sir.

Q. The solid red lines represent lines under ordinance 6695 run down to Canal street?

A. Yes; from Thalia.

131 Q. And up to Thalia along Claiborne street?

A. Yes, sir.

Q. The same ordinance granted rights from Claiborne street along such streets as might be selected to the river front, with the right to extend its tracks through Front street, Water street, and Pilie street

and along the river front between Julia and Jackson streets. Have you a line marked along Thalia street?

A. Yes, sir; I have given under ordinance 6732.

Q. That was the ordinance fixing Thalia street as the street through which this company was to go from Claiborne street to the river?

A. Yes, sir; such street as might be selected under ordinance 6732, and I understood that Thalia street was selected.

Q. This map shows lines through Pilie, Water, and Front street and between Jackson street and Julia street, does it not?

A. Yes, sir.

Q. That is shown by the solid red lines?

A. Yes, sir.

Q. The right through Thalia street under 6732 is shown on the map by broken red lines?

A. Yes, sir.

Q. Now, the rights of the company under ordinance 6938 are how shown upon the map?

A. Those rights are shown by the solid white lines.

Q. Now, describe the points upon the map through which this white line runs.

A. That ordinance, as I read it, gives the right of way down the river front from the property in front of the Upper City park which is marked on the map down to Louisiana without special
132 location by streets. I therefore represented it by this solid white line down the river front.

Q. From the park property to what point?

A. To Jackson street. It gives also the right from said property in front of the park back to their terminus, declared in ordinance 6695 to be by such route as may be selected. That route I have assumed down Walnut street to Claiborne.

Q. And from that point?

A. Along Claiborne street to the intersection of Thalia.

Q. Are the terminal facilities at the foot of Thalia street represented on this map?

A. Yes, sir; they are.

Q. It is marked Depot of the T. & P. railroad?

A. Yes, sir.

Q. Where is Gouldsboro' with reference to this Thalia-street terminus?

A. Approximately opposite on the right bank.

Q. Where is Westwego with reference to the park property—on the river front opposite the Upper City park?

A. Approximately opposite—probably about.

Q. Is it shown on the map?

A. Yes, sir.

Q. Are the depots on the river front of the Louisville & Nashville R. R. and Morgan's Louisiana & Texas R. R. shown on the map?

A. Yes, sir; they are at the foot of Julia, Girod, Lafayette, and Poydras streets.

Q. Now, Major, this is a correct map with reference to the locality

and relative position of the different streets in the city of New Orleans which the map purports to cover?

133 A. Yes, sir.

Q. Therefore Carrollton avenue, Claiborne street, and the new canal are properly represented upon this map?

A. Yes, sir.

Q. Then Carrollton avenue, as a matter of fact, joins the new canal on its way from the river to its terminus, does it not?

A. Yes, sir.

Q. Claiborne street at its upper end cuts Carrollton avenue, does it not?

A. Yes, sir.

Q. Claiborne street crosses the new canal, doesn't it?

A. Yes, sir.

Q. So that if a point were located in the city of New Orleans between the new canal, Claiborne street, and Carrollton avenue it would be a perfect enclosure of the section, would it not?

A. Yes, sir.

Q. Or, rather, the point would be within a perfect enclosure?

A. Yes, sir; by the boundaries mentioned in the ordinance.

Q. And the three streets mentioned are correctly shown upon this map?

A. Yes, sir; the three boundaries mentioned.

Q. Major, describe, if you can, and locate upon this map the amount of trackage of the Texas & Pacific on the left bank of the Mississippi river—New Orleans side.

A. They have tracks in and about their Thalia-street depot property and ferry crossing—along the river front between Race St., I think, and the depots of the Louisville & Nashville R. R. and Morgan's Louisiana & Texas. They certainly go up as far as

134 Race street. I can't state how far down they go without an examination. They go certainly to the depots of the Illinois Central R. R.

Q. The Illinois Central having parallel lines along the river front?

A. Yes, sir.

Q. Has this railroad ever built any track along Thalia street?

A. No, sir.

Q. Has it ever built any track above Race?

A. Not to my knowledge.

Q. Don't you know as a matter of fact that it has not?

A. They have not.

Q. How many tracks has the Belt railroad along Louisiana avenue and down the river front between Louisiana Ave. and Jackson St.?

A. It has a single track.

Q. One single track?

A. Yes, sir.

Q. Now, Major, look at Exhibit "P," made part of the first supplemental bill in this case, and state whether that shows about the situation of the tracks immediately about the Thalia-street terminus

of this railroad company going along the river front on the levee and into their incline.

A. I think that represents the location of their tracks there.

Q. Are their tracks along there correctly represented?

A. Yes, sir; that is the incline——

Q. Does it show the proposed spur of their tracks on the levee to their wharf on the upper side of the incline?

A. Yes, sir.

Map R. No. 4 offered in evidence in connection with testimony of the witness.

Cross-examination by Mr. HOWE:

135 Q. I notice, Major, that your testimony and your map have been directed to ordinances 6695, 6732, and 6938. Has your attention been called to ordinance No. 7946, A. S., which I now show you?

A. Not in connection with that map have I any recollection of seeing that ordinance.

Q. Your map, as I understand, shows by its white lines a line extending from Louisiana avenue down to Jackson street?

A. Yes, sir.

Q. And your construction of the ordinance therefore is that the city conferred some rights to build a line down from Louisiana avenue to Jackson street down the river front?

A. Yes, sir; or to connect with the Belt road.

Q. In any event, you have put down the white line extending from Louisiana avenue to Jackson street?

A. My understanding of that was that it gave a right of construction down to Louisiana avenue to connect with the Belt. The right of construction or connection from Louisiana avenue to Jackson street was an open question with me, the Belt road being already in existence over that part.

Q. What I want to know is if the white line shows an extension from Louisiana avenue to Jackson street?

A. Yes, sir.

By Mr. LEE:

Q. In drawing these lines did you pretend to decide whether those were the rights the company had?

A. No, sir.

Q. These lines are intended to assist the court in ascertaining the general route of the trains of the company?

136 A. Yes; the streets over which they have the right of way by construction or connection.

D. M. BROSNAN sworn for respondents.

Direct examination by Mr. LEE:

Q. What is your occupation now, Mr. Brosnan?

A. That of surveying.

Q. Civil engineer generally?

A. Yes, sir.

Q. What was your occupation between the 9th of November, 1880, and subsequent years?

A. That of city surveyor.

Q. Between what dates?

A. About November of '80 or '79; I think '80—no, '79, up to April a year ago—April, '88.

Q. Did the Texas & Pacific Railway Company ever, while you were city surveyor, call upon you to furnish it with lines and levels for rights claimed under certain ordinances passed by the city?

A. The company, through its representative, Mr. Wheelock, asked me to prepare a chart of rights of way that were granted to the company, and subsequently called on me for lines on the river front.

Q. Did you prepare these lines and levels according to the request of Mr. Wheelock?

A. I prepared them as I thought they were granted to them.

Q. You prepared all the lines and levels under all of their claimed rights?

A. I thought I had.

137 Q. Did you ever have any complaint as to any other part of the lines except between Jackson street and Louisiana avenue?

A. Mr. Wheelock brought the chart that I had handed him into the office about six months after he had received it from me and objected to the representation of Louisiana avenue on that chart. Louisiana avenue was drafted its full length, from the river to Carrollton avenue. Mr. Wheelock objected to its being there and wanted it eliminated.

Q. That chart which you speak of, is it the one in evidence on behalf of complainant and the one which I now hand you?

A. I recognize it. It is the correction of the one that I gave him—that is, with Louisiana avenue cut off of it. I couldn't take it off of it except by cutting it off.

Q. Then this map that you have in your hand shows the lines and levels that Major Wheelock requested of you and which you gave him, except the lines and levels along Louisiana avenue?

A. Lines and levels with the omission of Louisiana avenue on the chart——

Q. But this map shows the lines and levels under the various ordinances passed by the city in favor of the New Orleans and Pacific and Texas & Pacific R. R. Co.?

A. The lines as I considered were granted to them, but I waived my opinion.

Q. What was the condition or, rather, objection to the first chart prepared?

A. The first objection to the chart was, it had Louisiana avenue upon it, and it didn't have a representation of construction between Louisiana avenue and Jackson street.

Q. Then you did what to the map?

138 A. I had to cut it.

Q. You took Louisiana avenue out?

A. Yes, sir.

Q. Did you leave on it lines for the construction of a track between Louisiana Ave. and Jackson street, along the river front?

A. I left no lines that wasn't in on the other.

Q. There was no lines between Louisiana Ave. and Jackson — on the first one?

A. No, sir.

Q. What was Col. Wheelock's objection—that you had shown lines on Louisiana — and none between Louisiana Ave. and Jackson street?

A. Well, not that he had any objection, but that I had marked no route of way granted to the N. O. & P. Co. on that part from Louisiana Ave.; but it represented no track along the river front from Louisiana Ave. to Jackson —. Mr. Wheelock requested that I would give him that route of way, or representation of that route of way, but, as I had given a chart which had been in the possession of Mr. Wheelock for about six months, I didn't see that I could form any other opinion than that I had given him, and, although I waived my opinion in the matter as far as I was concerned as city surveyor, I didn't want to prevent the company from getting any or all of its rights.

Q. Then the original map was in the possession of Col. Wheelock for about six months before this complaint of error was made to you?

A. Yes, sir; the whole of it was there.

Q. Col. Wheelock has testified in regard to a visit that he and yourself and other persons paid along the river front between Jackson street and Louisiana avenue for the purpose of getting

139 lines and levels for the road between those points. Please state what occurred at that visit.

A. I recollect of Col. Wheelock and Mr. Cavanac coming to the city hall, and I accompanied them up to the river front and they were talking of trackage or ways of tracks. This was in the neighborhood of the elevator—along there somewhere we started—but I don't know that we went all the way down the river front between the two points mentioned—that is, between Louisiana avenue and Jackson street—but we went a part of the way. I don't recollect whether it was to see whether there was room for a track or whether I was to locate a track. It is entirely out of my mind.

Q. Can you recollect whether you were requested during that conference or afterwards to furnish lines and levels for a track between Jackson — and Louisiana avenue?

A. I was asked to furnish lines and levels afterwards, but I could not furnish them.

Q. Why couldn't you?

A. Because I hadn't furnished them on the chart.

Q. Why did you not put them on the chart?

A. Because the best that I could do in reading this section 3rd of

ordinance 6938, page 13 of Exhibit "A B C," granted the right to the company to connect with the Belt road at Louisiana avenue.

Q. Your construction of that section, then, was that they might have a separate track from their park property at the river side of the park down to Louisiana avenue?

A. Yes, sir.

Q. But at that point they must travel over the Belt road to Jackson street or lower on?

140 A. That is the way I construed it.

Q. That is the reason you didn't furnish lines and levels between Jackson street and Louisiana avenue?

A. Yes, sir.

Q. Because you considered that section 3 of that ordinance failed to give them any right to a separate track between those two points?

A. Yes, sir.

Q. Now, did you make any concession subsequently in regard to your opinion in that matter?

A. I waived my opinion in the matter.

Q. Did you furnish lines and levels for a track between those two points?

A. I prepared a chart of the river front with the location of the Belt road.

Q. When did you do that—how soon after that interview?

A. I forget; about that time.

Q. Within a month or two or a week or two?

A. Say a month or two.

(Counsel for complainant objects to any testimony in regard to that chart unless the chart is produced.)

Q. Col. Wheelock in his testimony places this conference I have spoken of as about May or June, 1883. Then I understand that you prepared a chart showing a line along the river front for this railroad company between Louisiana avenue and Jackson street within a couple of months after that?

A. No; I didn't prepare a chart of lines for the company. I merely prepared a chart of the river front, indicating the whole river front and the location of the Belt road. That was all

141 a delineation of track in front and Belt road.

Q. What did you do with that chart?

A. It was a tracing of one of the charts that is in the surveyor's office now. I sent the tracing to Col. Wheelock.

Q. Why did you send it to him?

A. Because Mr. Wheelock asked me for his rights along the river front and my construction was the right over the Belt road; but it was an open question for them to have the right of construction.

Q. That chart showed the condition of the river front with the railroad tracks on it?

A. Yes, sir.

Q. Showed just that part of the river front over which they claimed to lay a track?

A. Yes, sir.

Q. What did Mr. Wheelock say when you tendered him this chart?

A. I think Mr. Wheelock sent word to me that that wasn't what he wanted; that it wasn't according to the ordinance—something of that sort.

Q. That chart was returned to you?

A. No, sir.

Q. Well, what became of that chart?

A. The chart that I have just referred to was filed in evidence as Exhibit "E" in the proceedings No. 8825 of the docket of the civil district court for the parish of Orleans, entitled State *ex rel.* New Orleans, Texas & Pacific R. R. Co. *vs.* D. M. Brosnan, surveyor of the city of New Orleans.

Q. Were you ever requested in writing by the Texas & Pacific R. R. to give lines and levels along the river front between Lou-
142 isiana avenue and Jackson street for a separate track for them?

A. Yes, sir; through their attorney, Judge Howe.

Q. How many times?

A. Twice.

Q. You replied to those letters?

A. Certainly, I did the courtesy of replying.

Q. And those letters contained your expression of opinion in reply to what was contained in the judge's communications?

A. Certainly.

Q. Look at Exhibit "P," annexed to the first supplemental bill and made part of it, and state whether you ever were called upon by the railroad company to give them lines and levels for a spur track which is marked on this map as "proposed spur."

A. I think I was called upon to give them lines and levels for the proposed spur.

Q. Well, did you give them?

A. No, sir.

Q. Why did you not give those lines?

A. Because I had to refer the subject to the city council.

Q. Why?

A. There was a resolution in existence prohibiting the city surveyor from giving any lines whatever on the public highway, either for paving or track-laying, without first being passed upon by the council; that was a resolution offered by Mr. Lagan.

(Counsel for complainant objects to any testimony in regard to a resolution, and asks that it be produced.)

143 A. I referred the communication of the company to the council.

Q. And the reason you referred it was on account of the resolution?

A. Yes, sir; if it was not in existence I would have given the line. I have stated so before; if it hadn't been for the resolution. I stated that in the case formerly when you were taking testimony in the circuit court. I stated the reason why.

Q. Now, about the time that you refused to furnish lines and levels for the track along the levee between Louisiana avenue and Jackson street, were any legal proceedings taken against you?

A. Well, subsequently to that time I think the company started a mandamus or something, and is still pending.

Q. Mr. Brosnan, look at the map marked "R. No. 1" and locate upon it with this blue pencil the present situation of Claiborne market.

A. I will locate it, about. (Witness makes mark with a blue pencil.)

Q. About how wide is Claiborne street?

A. It is 191 feet 10 inches.

Q. How much of that is taken up in natural ground, so called?

A. About 128 feet.

Cross-examination by Mr. HOWE:

Q. (It is agreed that the large map of lines, &c., from an original by Mr. Surveyor Brosnan and referred to in the testimony of E. B. Wheelock and Mr. Brosnan be now marked "T. & P.," and referred to accordingly and considered in evidence in the testimony of Wheelock and being the same paper referred to by Mr. Brosnan).

The WITNESS: I want to state that the location of the line was actually located right on down to Louisiana avenue from the park.

144 Q. The map, then, which has been marked "T. & P.," as I understand, you will correct me if I am wrong, shows the lines granted by the ordinances in question with the exception of lines from Jackson street down to the Thalia-street terminus and the disputed portion between Louisiana avenue and Jackson street?

A. Yes, sir; and the company has the right of a track construction, I think, as far as Julia street, and that is not on the chart—that is, the chart indicates nothing below Louisiana avenue along the river front.

Q. When you first furnished this map to Mr. Wheelock, as you have stated, you didn't give any lines between Louisiana avenue and Jackson street?

A. That wasn't indicated on the chart.

Q. And you have never yet given those lines of construction for the Texas & Pacific or New Orleans and Pacific?

A. Between those two points—no, sir. I have left it an open question.

Q. When you spoke of making a little chart of that portion of the city front which extends from Louisiana avenue to Jackson street, that, I understand, contained a delineation of the line of the Belt road in that portion of the city?

A. Well, it was a delineation of the whole river front as it now exists with the Belt railroad marked upon it.

Q. But it didn't contain what I might term any original line of construction for the Texas & Pacific or New Orleans & Pacific?

A. No, sir.

By Mr. LEE:

Q. The railroad company got from you everything in the way of lines and levels they asked for except the lines and levels along the front between Louisiana avenue and Jackson street?

A. Yes, sir.

Q. That was the disputed point and the only one?

A. Yes, sir; only one—so I understand.

145 *Certificate of Register of Conveyances Showing Various Sales of Property Shown on the Pilié Map, Marked "R. No. 2." Offered Feb'y* 24, 1891.

CONVEYANCES OFFICE, PARISH OF ORLEANS.

The following sales were registered in this office, to wit:

Sale by John Hagan & George Washington Louis Gilbert Dumottier de Lafayette & wife to—

											Date of inscription.	
F. T. Harman,	lots	2, 3,	in	sq're	18,	registered	C. O.,	B'k	27,	fo. 339	30 June,	1840.
P. Maher,	"	4,	"	do.	do.	do.	do.	"	27,	" 338	do.	
T. Keough,	"	5,	"	do.	do.	do.	do.	"	27,	" 337	do.	
Dr. Warren Stone,	"	6, 7, 8, 14, 15, 16, 17, 18,	"	do.	do.	do.	do.	"	28,	" 497	14 Oct'r,	1840.
J. Cummins & A. Muir,	"	9 & 10,	"	do.	do.	do.	do.	"	28,	" 281	11 June,	1840.
J. Gallagher,	"	11,	"	do.	do.	do.	do.	"	29,	" 295	22 May,	1841.
Th L. Graham,	"	12,	"	do.	do.	do.	do.	"	29,	" 293	do.	
A. S Ranney,	"	13,	"	do.	do.	do.	do.	"	29,	" 129	27 March,	1841.
Wow. C. Johnson,	"	19,	"	do.	do.	do.	do.	"	29,	" 392	28 June,	1841.
Jas. Denny,	"	20,	"	do.	do.	do.	do.	"	29,	" 358	12 June,	1841.
M. Murphy,	"	1, 2,	"	do.	20,	do.	do.	"	27,	" 345	3 July,	1840.
—— —,	"	3, 4,	"	do.	do.	do.	do.	"	—,	" ——		
D. S. Clark,	"	5, 6,	"	do.	do	do.	do.	"	27,	" 513	23 Oct.,	1840.
C. D. de Lassus,	"	1, 2, 3, 4, 5, 6,	"	do.	21.	do.	do.	"	27,	" 407	8 Aug't,	1840.
Rob't Pringle,	"	7, 8,	"	do.	do.	do.	do.	"	27,	" 305	16 June,	1840.
Mat. Crooks,	"	9, 10,	"	do.	do.	do.	do.	"	27,	" 274	8 June,	1840.
M. Murphy,	"	11, 12,	"	do.	do.	do.	do.	"	27,	" 315	3 July,	1840.

CONVEYANCE OFFICE, PARISH OF ORLEANS.

I, A. J. Villeré, register of conveyances for the parish of Orleans, do hereby certify that the foregoing sixteen sales were registered in this office as indicated above, and that in the acts of sale so registered the property sold is designated by the numbers aforesaid on and the measurement is given in conformity with a plan made by Joseph Pilié on the 1 May, 1840, and deposited in the office of D. L. McCay, notary, in this city.

(Stamp.) Given under my hand and seal this seventh day of October, 1889.

(Signed) A. J. VILLERÉ, *Register.*

146 *Stipulation to Adopt Statement in Lieu of Record No.* 8825, *State ex Rel. Texas & Pacific R'y Co. vs. D. M. Brosman, City Surveyor. Filed June* 27, 1891.

TEXAS AND PACIFIC RAILWAY COMPANY *et al.* vs. THE CITY OF NEW ORLEANS. } No. 11397. In Chancery.

It is agreed by and between the undersigned, counsel of the respective parties hereto, that the record of the suit of State *ex rel.*

The Texas and Pacific Railway Co. *vs.* D. M. Brosnan, city surveyor, No. 8825 of the docket of the civil district court for the parish of Orleans, offered in evidence on behalf of defendant herein, shall not be copied into the transcript of appeal, but that the following statement in regard to the contents thereof shall stand in lieu of the same and be inserted into the transcript in its stead:

The proceedings in that suit were by mandamus against the then city surveyor, D. M. Brosnan, to compel him to furnish the relator with the lines and levels for a track along the river front of the Mississippi at New Orleans, between Louisiana avenue and Jackson streets, all in accordance, relator claimed, with section 3 of ordinance No. 6938, administration series, to be found in the record as Exhibit "C," made part of complainants' bill. The suit was instituted on June 11th, 1883, and is still pending in the civil district court.

New Orleans, La., June 26th, 1891.

(Signed) HOWE & PRENTISS,
Solicitors of Complainant.
FRANCIS B. LEE,
Assistant City Attorney, Sol. of Defend't.

147 Map offered in connection with testimony of Harrod, marked "R. No. 4," to be carried up and filed with this transcript.

Announcement of Decision in Favor of Complainants upon Certain Questions Argued and Submitted and Case Continued for Further Hearing.

Extract from the Minute Book, April Term, 1891.

NEW ORLEANS, TUESDAY, *May* 12, 1891.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

TEXAS & PACIFIC RAILWAY CO. & *als.*
vs.
THE CITY OF NEW ORLEANS. } No. 11397.

In this cause, heretofore heard, the court this day announced its decision to be in favor of the complainants upon the questions argued and submitted by counsel on the hearing, and ordered that the case be set down for further hearing on Saturday, May 16, 1891, at 11 a. m.

Order: Solicitors of Complainants Ordered to Draw up Decree, &c.

Extract from the Minute Book, April Term, 1891.

NEW ORLEANS, SATURDAY, *May 16th*, 1891.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

148 TEXAS & PACIFIC R'Y CO. *vs.* CITY OF N. O. *et als.* } No. 11397.

In this case set down for hearing this day in accordance with the order entered herein on May 12, 1891, counsel for the parties being present and submitting the matter to the court, the court, in accordance with the views expressed orally when the decision was announced, May 12th, on the main point at issue, announced its opinion to be in favor of complainants, and the solicitors were directed to draw up a decree.

Hearing and Submission of Case upon Further Argument as to Certain Questions.

Extract from the Minute Book, April Term, 1891.

NEW ORLEANS, SATURDAY, *May 30th*, 1891.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

TEXAS & PACIFIC RAILWAY CO. *vs.* CITY OF NEW ORLEANS. } No. 11397.

This cause came on this day for further argument as to certain questions therein—W. W. Howe appearing for the complainants; Francis B. Lee, assistant city attorney, for the city of New Orleans—and after further argument from the counsel for the parties respectively was submitted.

149 *Decree. Entered and Filed June* 23, 1891.

THE TEXAS & PACIFIC RAILWAY COMPANY & THE FIDELITY INSURANCE, TRUST & SAFE DEPOSIT COMPANY *vs.* THE CITY OF NEW ORLEANS. } No. 11397. In Chancery.

Final decree.

This cause came on at this term to be heard on pleadings and proofs and was argued by counsel.

W. W. Howe, Esqr., for complainant-; F. B. Lee, Esq., assistant city attorney, for defendant.

On consideration whereof it is now ordered, adjudged, and decreed that the ordinances of the city — New Orleans set forth on the bill of complaint in this cause and known as number six hundred and eighty-five (685) and number eighteen hundred and twenty-eight (1828), council series, are and were illegal and injurious to the complainants herein and declared to be of no effect, and the restraining orders and injunctions heretofore granted in this cause *pendente lite* be, and they are hereby, made perpetual, and that the city of New Orleans, her officers, agents, and servants, be, and they and each of them hereby are, perpetually enjoined and restrained from executing and enforcing said ordinance No. 685, council series, approved April 24th, 1884, and said ordinance No. 1828, council series, approved June 16th, 1886, and from in any way interfering with, denying, or impairing the rights conferred on and acquired by the Texas and Pacific Railway Company, as transferee and assigns of the New Orleans Pacific Railway Company and of the
150 Fidelity Insurance, Trust and Safe Deposit Co., as mortgagee, under the following ordinances of the city of New Orleans set forth in the bill of complaint, to wit: No. 6695, administration series, adopted November 9th, 1880; number 6732, administration series, adopted December 3d, 1880; number 6938, administration series, adopted March 29, 1881, and number 7946, administration series, adopted July 11, 1882; which ordinances and each and every grant therein and thereby made are hereby declared and decreed to be existing and valid grants in favor of the complainant The Texas and Pacific Railway Company, as transferee of the New Orleans Pacific Railway Company, and of said Fidelity Insurance, Trust and Safe Deposit Co.

It is further ordered that the right of the said complainant, The Texas and Pacific Railway Co., to occupy and use the alluvion or batture in front of the Upper City park outside of the public levee, as conferred by the second section of the said ordinance No. 6938, A. S., of March 29, 1881, and all the rights given and granted under the third section of said ordinance No. 6938, A. S., and the right of the said company under said ordinance No. 6695, A. S., approved Nov. 9th, 1881, to lay its tracks on Claiborne street and build a passenger depot on the neutral ground of said Claiborne street near Canal street, and to remove the Claiborne market, are each and all hereby specially recognized and declared to be valid and existing grants, without prejudice, however, to any rights which the city of New Orleans, as the successor of the late park commission or as having the administration of the Audubon park vested in it by law, may have in limitation or control of the rights, the grant of
151 which is hereby confirmed, springing out of the destination of the said Audubon park as a public place.

It is further ordered and decreed that the complainants have and recover from the city of New Orleans their costs in this case, which have been taxed at the sum of one hundred and fifty-two $\frac{8}{100}$ dollars.

New Orleans, June 23, 1891.

(Signed) EDWARD C. BILLINGS, *Judge.*

Petition for Appeal and Order. Filed and Entered June 26, 1891.

TEXAS AND PACIFIC RAILWAY COMPANY
vs.
THE CITY OF NEW ORLEANS.
No. 11397. In Chancery.

To the honorable the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

The petition of the city of New Orleans with respect represents—

That it is aggrieved and injured by the final decree herein rendered by this honorable court and signed on the 23rd day of June, 1891, making perpetual the writ of injunction issued against the said city, and desires to take an appeal therefrom which shall have the effect of a supersedeas.

Wherefore it prays that it be allowed an appeal from the said judgment to the Supreme Court of the United States, returnable to that court on the 24th day of July, 1891, upon its furnishing
152 bond in the sum to be fixed by the court.

(Signed) FRANCIS B. LEE,
Assistant City Attorney.

Let an appeal be, and the same is hereby, granted as prayed for in the foregoing petition to the Supreme Court of the United States, returnable thereto on the 24th day of July, 1891, upon petitioner furnishing a bond with good and solvent security, conditioned as the law directs, in the sum of five hundred dollars, and that the said appeal when perfected shall have the effect of a supersedeas.

(Signed) EDWARD C. BILLINGS, *Judge.*

New Orleans, June 25, 1891.

153 UNITED STATES OF AMERICA:

Know all men by these presents that we, the City of New Orleans (State of Louisiana), as principal, and Joseph A. Shakspeare, as security, are held and firmly bound, jointly and severally, unto the Texas & Pacific Railroad Company and the Fidelity Insurance, Trust and Safe Deposit Company in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Texas & Pacific Railway Company and the Fidelity Insurance, Trust and Safe Deposit Company, their heirs, executors, administrators, and assigns; for which payment, well and truly to be made, we bind ourselves and each of us by himself, and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the 23d day of June, in the year of our Lord eighteen hundred and ninety-one.

Whereas the said City of New Orleans having heretofore, to wit, on the — day of June, 1891, taken an appeal to the Supreme Court of the United States from and to reverse the decree rendered on the 23d day of June, 1891, by the circuit court of the United States for

the fifth circuit, holding sessions in and for the district of Louisiana, New Orleans, Louisiana, in the suit of The Texas & Pacific Railway Company & *al. versus* The City of New Orleans, No. 11397 of the docket thereof:

Now, the condition of the above obligation is that if the above-bounden The City of New Orleans shall prosecute its said appeal to effect and shall answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

(Signed) CITY OF NEW ORLEANS,
By JOS. A. SHAKSPEARE, *Mayor.* [L. S.]
JOS. A. SHAKSPEARE. [L. S.]

Signed, sealed, and delivered in the presence of—
(Sig.) FRANCIS B. LEE.

Bond and sufficiency of surety approved.
June 25, 1891.
(Signed) EDWARD C. BILLINGS, *Judge.*

154 [Endorsed:] No. 11397. United States circuit court, district of Louisiana. Texas & Pacific Railway Co. & *al. vs.* The City of New Orleans. Bond for appeal. Filed June 25, 1891. —— ——, clerk.

UNITED STATES OF AMERICA, *District of Louisiana,* } *ss:*

Personally appeared Joseph A. Shakspeare, who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides in the city of New Orleans, and is worth the full sum of five hundred dollars over and above all of his debts and liabilities and property exempt from execution.

(Signed) JOS. A. SHAKSPEARE.

Subscribed and sworn before me this 25th day of June, 1891.
[L. S.] (Signed) CAS. H. SHIELDS, *Not. Pub.*

155 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 154 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial in the case of The Texas and Pacific Railway Company *et al. vs.* The City of New Orleans, No. 11397 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 10 day of July, A. D. 1891.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT, *Clerk.*

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 10th day of July, A. D. 1891.

EDWARD C. BILLINGS, *Judge.*

156 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to the Texas & Pacific Railway Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the 24th day of July, 1891, pursuant to a petition and order for appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein The City of New Orleans is appellant and The Texas and Pacific Railway Company and The Fidelity Insurance, Trust and Safe Deposit Company are appellees, to show cause, if any there be, why the judgment rendered against the said City of New Orleans, as in said petition mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 26 day of June, in the year of our Lord one thousand eight hundred and ninety-one.

EDWARD C. BILLINGS, *Judge.*

157 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 11397. The Texas & Pacific Railway Co. *et al. vs.* City of New Orleans. Citation. No. —. U. S. circuit court, eastern district of Louisiana, New Orleans division. Filed July 3, 1891. E. R. Hunt, clerk.

Marshal's Return.

Received by U. S. marshal, New Orleans, La., June 26, '91, and on June 27, '91, I served a true copy of the within citation of appeal on the Texas & Pacific Railway Co., appellee, by handing the same to W. W. Howe, attorney of record, in person in the city of New

Orleans, who informed me that he accepted service on behalf of the appellee.

New Orleans, June 27, '91.

J. B. DONNALLY,
U. S. Marshal,
By JOS. DEVONSHIRE,
D'y Marshal.

STATE OF LOUISIANA, *ss:*

Joseph Devonshire, being duly sworn, deposes & says that he is a lawful deputy U. S. marshal for the eastern district of Louisiana, and that the foregoing service was made by him in the manner set forth in the above return.

JOSEPH DEVONSHIRE.

Sworn and subscribed before me on June 30th, 1891.

J. DEVONSHIRE,
U. S. Comm'r.

158 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to the Fidelity Insurance, Trust and Safe Deposit Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the 24th day of July, 1891, pursuant to a petition and order for appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein The City of New Orleans is appellant and The Texas and Pacific Railway Company and The Fidelity Insurance, Trust and Safe Deposit Company are appellees, to show cause, if any there be, why the judgment rendered against the said city of New Orleans, as in said petition mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 26 day of June, in the year of our Lord one thousand eight hundred and ninety-one.

EDWARD C. BILLINGS, *Judge.*

159 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 11397. The Texas & Pacific Railway Co. *et al. vs.* City of New Orleans. Citation. No. —. U. S. circuit court, eastern district of Louisiana, New Orleans division. Filed July 3, 1891. E. R. Hunt, clerk.

Marshal's Return.

Received by U. S. marshal, New Orleans, La., June 26, '91, and on June 27, '91, I served a true copy of the within citation of appeal on The Fidelity Insurance, Trust and Safe Deposit Company, appellee, by handing the same to W. W. Howe, attorney of record,

in person in the city of New Orleans, who informed me that he accepted service on behalf of the appellee.

New Orleans, June 27, '91.

J. B. DONNALLY,
U. S. Marshal,
By JOS. DEVONSHIRE,
D'y Marshal.

STATE OF LOUISIANA, *ss:*

Joseph Devonshire, being duly sworn, deposes and says that he is a lawful deputy U. S. marshal for the eastern district of Louisiana, and that the foregoing service was made by him in the manner set forth in the above return.

JOSEPH DEVONSHIRE.

Sworn and subscribed before me on June 30th, 1891.

J. DEVONSHIRE,
U. S. Comm'r.

Endorsed on cover: Case No, 14,736. E. Louisiana C. C. U. S. No. 542. The City of New Orleans, appellant, *vs.* The Texas and Pacific Railway Company and The Fidelity Insurance, Trust and Safe Deposit Company. Filed July 13, 1891.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895. No. 32. (No. 3, 1896).

CITY OF NEW ORLEANS

versus

THE TEXAS & PACIFIC RAILWAY COMPANY ET ALS.

STIPULATION TO CORRECT TRANSCRIPT.

At p. 64, line 21 from bottom, the word "to" should be "in."

W. W. HOWE,
For Appellees.

E. A. O'SULLIVAN,
City Atty., for Appellant.

NEW ORLEANS, April 24th, 1896.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895. No. 32. (No. 3, 1896).

CITY OF NEW ORLEANS

versus

THE TEXAS & PACIFIC RAILWAY COMPANY ET ALS.

STIPULATION AS TO MAP.

The Map offered at p. 73 of transcript, marked "T. & P.," filed Oct. 15, 1889, being an original in use in New Orleans, a copy thereof may be taken up by either party and used in lieu of original in Supreme Court.

W. W. HOWE,
For Appellees.

E. A. O'SULLIVAN,
City Atty., for Appellant.

NEW ORLEANS, April 25th, 1896.

APPELLANT'S BRIEF

Office Supreme Court U. S.
FILED
MAY 4 1898
JAMES H. MCKENNEY
CLERK.

Brief of Samuel L. Gilmore
Filed May 4, 1898.

SUPREME COURT OF THE UNITED STATES

No. 14,754.

No. 1, October Term, 1897.

CITY OF NEW ORLEANS, *Appellant*,

versus

THE TEXAS & PACIFIC RAILROAD COMPANY AND THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY, *Appellee*.

APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

Brief on Behalf of the City of New Orleans, Appellant.

SAM'L L. GILMORE,
Solicitor for the City of New Orleans.

L. GRAHAM & SON, LTD., LAW BOOKSELLERS, ETC., NEW ORLEANS.

SUPREME COURT OF THE UNITED STATES

No. 14,734.

No. 1, October Term, 1897.

CITY OF NEW ORLEANS, *Appellant*,

versus

THE TEXAS & PACIFIC RAILROAD COMPANY AND THE FIDELITY INSURANCE, TRUST AND SAFE DEPOSIT COMPANY, *Appellee*.

Appeal from the United States Circuit Court for the Eastern District of Louisiana

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Brief on Behalf of the City of New Orleans, Appellant.

Statement of the Case.

I.

On the 29th day of June, 1875, by an act passed before John G. Eustis, notary, at the city of New Orleans, the New Orleans Pacific Railway Company was duly incorporated under the general laws of the State of Louisiana.

By Art. 1 of its charter it was given corporate existence for the term of twenty-five years, from the 29th of June, 1875.

By Art. 3 it was empowered, among other things: To locate, construct, lease, own and use a railroad, with one or more tracks and suitable turnouts, upon

such course or route as may be deemed by a majority of the directors of said company most expedient, beginning at a point on the Mississippi river at New Orleans, or between New Orleans and the parish of Iberville, on the right bank of the Mississippi, and Baton Rouge on the left bank, or from New Orleans or Berwick's Bay via Vermilionville, in the parish of Lafayette, and Opelousas, in the parish of St. Landry, or from any of said points, or from any point within the limits of this State, and running thence toward and to the city of Shreveport, or the city of Marshall or Dallas, in the State of Texas, in such direction and route or routes as said company shall fix, and with such connecting branches in the State of Louisiana as may be deemed proper; to locate, construct, lease, own, maintain and use such branch railroads and tracks as the majority of the directors of said company may from time to time deem proper and expedient and for the interest of said company to own and to use, and lease, with the right to connect their main line with any other line or lines in other States, which shall authorize the exercise of said privilege within their limits; to establish and maintain in the city of New Orleans proper freight and passenger depots, and to connect them by tracks and ferries with the left bank of the Mississippi river, at such point or points as may be deemed most convenient for the public interest, and to use in such ferries, steamboats and other vessels, and for the purposes of such depots, tracks and ferries, to acquire property by expropriation; to acquire, construct, maintain and use suitable wharves, piers, warehouses, yards, steamboats, harbors, depots, stations and other works and appurtenances connected with and incidental to said railway and its connections, and to run and manage the same as the directors of the said company may deem to be most expedient and to the welfare of said corporation; to construct and maintain its said railroads, or any part of the same, and to have the right of way therefor across or along or upon any waters, water courses, river, lake, bay, inlet, street, highway, turnpike or canal within the State of Louisiana which the course of said railways may intersect, touch or cross, provided that said company shall preserve any water course, street, highway, turnpike or canal which its railways may so pass upon, along or intersect, touch or cross, so as not to impair its usefulness to the public unnecessarily; to obtain by grant or otherwise from any parish, city or village

within the State any rights, privileges or franchises that any of said parishes, cities or villages may choose to grant in reference to the construction, maintenance, management and use of the railroads of said company, its depots, cars, locomotives and its business within the limits of such or any of said parishes, cities and villages; to purchase or lease from any railroad company or corporation, at any authorized sale, any railroad and the charter, franchises, property and appurtenances thereof and to maintain and use the same as a part of the property of said company.

Transcript, pp. 43 to 49.

II.

On the 19th of February, 1876, the Legislature of the State of Louisiana passed an act known as Act No. 14 of the General Assembly of Louisiana of 1876, entitled

An act to confirm the notarial charter of the New Orleans Pacific Railway Company, with amendments thereto; to extend the term of existence of said company, and to confer thereon certain powers and franchises.

The notarial charter of the New Orleans Pacific Railway Company, passed before Eustis, of June 29, 1875, was incorporated in the preamble of Act No. 14 of 1876. This act, among other things, declared

That the term of existence of the said New Orleans Pacific Railway Company shall be so extended that said company by its name and under the aforesaid mentioned articles of incorporation shall have perpetual succession, and that Shreveport, in Louisiana, shall be the northwestern terminus of said New Orleans Pacific Railway, and that the main line shall be completed to Shreveport before any branches shall be constructed.

Transcript, pp. 43 to 50.

III.

On the 5th of February, 1878, the Legislature of the State of Louisiana passed an act known as Act No. 12 of the Gen-

eral Assembly of Louisiana of 1878, amending Act No. 14 of the year 1876 in particulars not of importance in this discussion.

Transcript, pp. 50, 51.

IV.

On the 9th of November, 1880, the Council of the city of New Orleans adopted an ordinance known as Ordinance No. 6695, Administration Series, entitled "An ordinance granting to the New Orleans Pacific Railway Company or its assigns the right to establish its *terminus* within the city limits, and to construct, maintain and operate a railroad *to and from such terminus, with one extension for passenger purposes and another for freight purposes into and through certain streets and places in the city of New Orleans.*"

The preamble of this ordinance is as follows:

> Be it ordained by the Council of the city of New Orleans, That whereas the New Orleans Pacific Railway Company, a corporation organized and existing under Louisiana State laws, is vested with authority under an act approved February 19, 1876, as follows, to-wit: 'To locate, construct, lease, own and use a railroad, with one or more tracks and suitable turnouts of such gauge and construction and upon such a course or route as may be deemed by a majority of the directors of said company most expedient;' 'and to and between the points and places mentioned and implied in said act, and is thereby authorized;' to establish and maintain in the city of New Orleans proper freight and passenger depots,' and to 'construct wharves, piers, warehouses, yards, depots and stations;' and to 'construct and maintain its said railroads in any part of the same, and to have the right of way therefor across and along or upon any street, highway, turnpike or canal in the State of Louisiana which the course of said railways may intersect, touch or cross.' Provided, the said company shall preserve any street, highway, turnpike or canal which its said railways may so pass upon, along or intersect, touch or cross, so as not to impair its usefulness to the public unnecessarily; and
>
> Whereas, It is for the interest of the city of New Or-

leans that the southern terminus of said railroad shall be fixed and established within the city limits; and

Whereas, the said New Orleans Pacific Railway Company is desirous of constructing its line of road on the *east bank of the Mississippi, from a crossing near Baton Rouge to some point in the city of New Orleans between the New Canal and Melpomene street, and to establish its terminus at such point* on condition that the city shall grant to the company the right to extend its tracks from such terminus into and through Claiborne street to Canal street for passenger purposes, and shall also grant the right to extend its track from such terminus north of Claiborne Canal by the most convenient and practicable route through the public streets to the river front for freight purposes, with the right to operate the same by steam or otherwise, as is now done on the Belt Railroad on St. Joseph street, and on the levees by other railroad companies in the city of New Orleans.

Now, therefore, for the purposes of permanently securing to the city of New Orleans the advantages that will result from locating and maintaining the terminus of said New Orleans Pacific Railway within the city limits.

By Sec. 1 of said ordinance it was ordained that the New Orleans Pacific Railway Company was authorized and empowered to locate, construct and maintain a railroad with all necessary tracks, switches, turnouts, etc., upon lines and levels to be furnished by the City Surveyor,

> *To and from such point as shall be selected by such company as its terminus, between the New Canal, Claiborne Canal and Carrollton avenue, with the right to establish and maintain at such point necessary depots, shops, yards, warehouses and other structures convenient and useful for the transaction of its business, and to operate the same by steam or otherwise for the transportation of freight and passengers within the city limits.*

By Sec. 2 of said ordinance it was ordained that the New Orleans Pacific Railway Company, or its assigns, were authorized and empowered to locate, construct and maintain an extension of its railroad, with all necessary tracks, switches, etc., upon lines and levels to be furnished by the City Surveyor, *into and through Claiborne street to Canal street,*

with a right to construct a passenger depot at or near the intersection of Claiborne street with Canal street, and to operate the same by steam or otherwise *for the transportation of passengers;* provided, that should it become necessary for the building of a depot, or the laying of tracks, to remove the Claiborne market, then the said New Orleans Pacific Railway Company was obliged to rebuild the same, at its own expense, on such lots to be purchased by the company as the city should designate, the market to be rebuilt under the supervision and instructions of the Administrator of Waterworks and Public Buildings.

By Sec. 3 of said ordinance it was ordained that said New Orleans Pacific Railway Company, or its assigns, were authorized and empowered to locate, construct and maintain an extension of its railroad, with all necessary tracks, switches, turnouts, etc., upon lines and levels to be furnished by the City Surveyor, across Claiborne Canal into and through such street as might thereafter be lawfully selected, to the river front, with the right to extend its track through Front street, Water street and Pilie, and along the river front between Julia and Jackson streets, connecting with the depots of the Louisville & Nashville Railroad Company, Morgan's Louisiana & Texas Railroad, and the Chicago, St. Louis & New Orleans Railroad Company, and to operate the same by steam or otherwise, *for the transportation of cotton, tobacco, grain, merchandise or other freight;* and the said company was authorized to purchase, lease, control, maintain and operate by steam or otherwise any railway or railway tracks existing in the streets of city of New Orleans.

By Sec. 4 of said ordinance it was expressly ordained that the right-of-way, franchises and privileges granted to the New Orleans Pacific Railway Company were granted *only on condition and in consideration that the said grantees should permanently establish the terminus of said road within the city limits and maintain said terminus during the existence of the charter of said company, for which period the said right-of-way and privileges should last; and should the said company at any time hereafter abandon its said road on the east side of the Missis-*

sippi river and its terminus within the city limits, then this grant should cease and terminate and be without force or effect from the date of such abandonment; and the further conditions that all construction work within the city limits should be executed under the direction and supervision of the City Surveyor, and completed to the satisfaction of the Administrator of Improvements and the Administrator of Commerce, *and that the said railway company should complete its road from the crossing of the Mississippi river at or near Baton Rouge to its terminus in this city within two years from the promulgation of this ordinance.*

By Sec. 5 of the ordinance it was ordained that *the rights granted on Claiborne street should only apply to a railroad for passenger purposes, and that the rights to be granted from north of the Claiborne Canal to the river front, and the rights granted along the river front and in parallel streets should apply to a railroad for freight purposes only, and should not be used as a thoroughfare for the transportation of passengers,* without the consent of the Council.

Transcript, pages 53–56.

V.

On the 3d of December, 1880, the Council of the City of New Orleans adopted an ordinance known as Ordinance No. 6732, Administration Series, and entitled "An Ordinance supplemental to Ordinance No. 6695 (Administration Series), granting to the New Orleans Pacific Railway Company right of way, for freight purposes, through Thalia street."

The preamble of this ordinance reads as follows:

> Whereas, on the 9th day of November, 1880, the Ordinance No. 6695 (Administration Series) was duly adopted, granting to the New Orleans Pacific Railway Company, or its assigns, *the right to establish its terminus within the city limits,* and to construct, maintain and operate a railroad *to and from such terminus; with one extension for passenger purposes, and another for freight purposes,* into and through certain streets and places in the city of New Orleans, and it was contemplated by said ordinance that a street should be duly selected

whereby the said company should have its rights recognized to lay a track from Claiborne street to the river front, through a street to be selected; now, therefore,

By Sec. 1 of this ordinance it was ordained that the New Orleans Pacific Railway Company, or its assigns, were authorized and empowered to locate, construct and maintain an extension of its railroad with all necessary tracks, switches, turnouts, etc., upon lines and levels to be furnished by the City Surveyor, *across Claiborne canal into and through Thalia street to the river front*, and to operate the same by steam or otherwise, *for the transportation of cotton, tobacco, grain, merchandise and other freight*, the company being also authorized to purchase, lease, control, maintain and operate by steam or otherwise, any railway or railway tracks then existing in the streets of the city of New Orleans, provided there should be but one track laid on Thalia street from Claiborne to Water street.

By Sec. 2 it was ordained that the right of way, franchises and privileges therein granted to the New Orleans Pacific Railway Company were granted only on condition and in consideration that the said grantee should permanently establish *the terminus of said road within the city limits*, and *maintain said terminus during the existence of the charter* of said company, for which period the right of way and privileges should last, and should the said company *at any time hereafter abandon its said road on the east side of the Mississippi river and its terminus within the city limits, then this grant should cease and terminate and be without force or effect from the date of said abandonment*, and upon the further conditions that the railroad company *at the time of laying their track upon Thalia street should pave said street from Pilie to Rampart streets*, including all intersections of said Thalia street, *with blocks of Boston granite*, according to specifications contained in the ordinance, the company being at all times obliged to keep said pavement, from curb to curb, in repair, and all construction work within the city limits to be executed under the direction and supervision of the City Surveyor and completed to the satisfaction of the Administrator of Commerce and the Administrator of Improvements, and upon

the still further condition that said railway company should complete its road from the crossing of the Mississippi at or near Baton Rouge to the terminus in this city within two years from the promulgation of this ordinance.

Transcript, pages 56 to 58.

VI.

On the 29th of March, 1881, the Council of the city of New Orleans adopted an ordinance known as No. 6938, Administration Series, entitled

> An ordinance amendatory of and supplementary to the Ordinance No. 6695, Administration Series, passed November 9, 1880, and Ordinance No. 6732, passed December 3, 1880, granting to the New Orleans Pacific Railway Company, or its assigns, the right *to establish its terminus within the city limits*, and to construct, maintain and operate a railroad *to and from such terminus, with one extension for passenger purposes, and another for freight purposes*, into and through certain streets and places in the city of New Orleans, and also with reference to and granting to said New Orleans Pacific Railway Company and its successors and assigns certain leasehold rights and permission for wharves, warehouses, elevators and sheds on the space, batture, and bank of the river in front of its property purchased or leased.

The preamble of this ordinance is as follows:

> Whereas the New Orleans Pacific Railway Company has purchased *the road heretofore constructed under the charter of the New Orleans, Mobile & Texas Railroad Company on the west bank of the Mississippi river between Bayou Goula and Westwego, and with a view to maintaining and operating the said road in connection with and as a part of its through line to and from its terminus in New Orleans, designated in Sec. 1 of Ordinance 6695, Administration Series, passed on the 9th day of November, 1880, such line to cross the Mississippi river from a point at or near Westwego to a point on the east bank of the river in front of the Upper City Park, late Foucher property, thence to extend by the best and most practical route to the designated terminus between the New Canal, Claiborne canal and Carrollton avenue.* Now, therefore, for the purpose of securing to the city of

New Orleans the advantages that will result from locating and permanently maintaining the terminus of the New Orleans Pacific Railway within the limits of the city of New Orleans, as hereinbefore recited.

By Sec. 1 of this ordinance it was ordained that the New Orleans Pacific Railway Company or its assigns were authorized and empowered to locate and maintain a railroad with all necessary tracks, switches, turnouts, etc., *from such point on the river front as its crossing from Westwego, shall be located at, in the vicinity of the Upper City Park, along the western border of said City Park, and from thence by the best and most practical route to its designated terminus east of Carrollton avenue.*

By Sec. 2 it was ordained that the city of New Orleans agreed to lease unto the New Orleans Pacific Railway Company, its successors or assigns, for a period of ninety-nine years, and at the price of $500 per annum, payable annually in advance, all that strip or parcel of ground on the river front of said Upper City Park, south of Tchoupitoulas street, or south of an extension of Tchoupitoulas street, in a westwardly direction, and between a prolongation of the east and west boundary lines of said park to the river, with all the batture formed thereon, or which may form during the term of said lease, with a right to establish and maintain upon said grounds such ferry facilities, wharves, piers, warehouses, yards, tracks, depots, stations, sheds, elevators, and other structures as might be necessary and convenient for the transfer of cars, engines, passengers and freight, and in the transaction of its business; and that no vessel should occupy or lie at said wharves without the consent of said company, its successors or assigns, and all vessels lying at or using said wharves with such consent to be exempt from the payment of levee or wharf dues to the city of New Orleans. The proceeds of such lease to be applied by the city to the improvement of said park.

By Sec. 3 of said ordinance it was ordained that the New Orleans Pacific Railway Company, its successors and assigns, should have the right to extend its tracks *from the said ground so leased between the Upper City Park and the river front east-*

wardly along said river front, to connect with the Belt road at Louisiana avenue, and to connect at Jackson street with tracks heretofore authorized to be constructed between Jackson and Julia streets by Sec. 3 of Ordinance 6695, Administration Series, adopted November 9, 1880, and by Ordinance 6732, Administration Series, adopted December 3, 1880, provided that between Louisiana avenue and Jackson street the trains of said company shall run only between sunset and sunrise on said track, except in case of emergency and necessity beyond the reasonable control of said company.

By Sec. 4 of said ordinance it was ordained that the New Orleans Pacific Railway Company, its successors and assigns, should have the right for the term of its charter and from and after the expiration of the then existing lease of said wharves, to enclose and occupy for its purposes and uses that portion of the levee, batture and wharf in the city of New Orleans in front of its riparian property acquired or to be acquired between Thalia and Terpsichore streets, and to erect and maintain thereon at its own expense such ferry facilities, wharves, piers, warehouses, elevators, yards, tracks, depots, stations, sheds and other structures as shall be necessary and convenient for the transfer of cars, engines, passengers and freight, and in the transaction of its business, and that no vessel should occupy or lie at such wharves without the consent of the said company or its successors or assigns, or discharge or receive cargo thereat, and all vessels lying at or using said wharves by such consent and on the business of the company shall be exempt from the payment of levee or wharf dues to the city of New Orleans; the railroad company was to light and police said wharves at its own expense, and any vessel lying at these wharves with the consent of the railroad company, but not on its business, was to be liable to the city for usual wharf or levee dues, and the railroad company was to build 300 feet of new wharf at such point between Terpsichore and Jackson streets for the city as the Administrator of Commerce might indicate, and was *to pave Pilie street between Thalia and Terpsichore streets, and Terpsichore between Pilie and Front streets* with square blocks of granite, or with

blocks of compressed asphalt and to keep the same in good order.

By Sec. 5 of this ordinance the Mayor was authorized to enter into a proper notarial contract of lease for the purpose of carrying out the provision of the second section of the ordinance.

By Sec. 6 it was ordained that the right of way, franchises and privileges therein and theretofore granted to the New Orleans Pacific Railway Company are and were granted *on condition and in consideration that the said grantee shall permanently establish its terminus within the city limits, and shall maintain said terminus during the existence of the charter of said company, for which period the said franchises, rights of way, grants and privileges shall last and continue; and should the said railway company at any time hereafter remove its terminus from within the city limits, then this grant should cease and determine and be without force and effect from the date of such removal,* and upon the further condition that the construction work within the city limits should be executed under the direction and supervision of the City Surveyor, and completed to the satisfaction of the Administrator of Improvements and the Administrator of Commerce, and *the further condition that said railway company should construct or control a line of road ready for public use from a crossing of the Mississippi river to its designated terminus in this city within two years from the promulgation of this ordinance.* Transcript, pages 58-60.

VII.

After the passage of Ordinances No. 6695 (Administration Series), No. 6732 (Administration Series) and No. 6938 (Administration Series), above referred to, the New Orleans Pacific Railway Company entered into a written agreement, dated the 20th day of June, 1881, with the Texas & Pacific Railway Company, a corporation organized under the laws of the United States.

By the terms of this agreement the New Orleans Pacific Railway Company consolidated itself with the Texas & Pacific

Railway Company, on the terms and conditions specified in the agreement, " by granting, bargaining, selling," etc.,

> unto the Texas & Pacific Railway Company all the franchises, corporate rights or privileges of the New Orleans Pacific Railway Company, together with its track, roadbed, buildings, rolling stock, engineer's tools, bonds, stocks, grants, privileges, property (real and personal), and every right, title and interest in and to any franchises or property, real or personal, and all rights of every name and kind in which the New Orleans Pacific Railway Company had any right, privilege or interest, situated and being in the State of Louisiana or in the State of Texas, or elsewhere, it being declared by the agreement that the object of the agreement was to so merge the rights, powers and privileges of the New Orleans Pacific Railway Company into the Texas & Pacific Railway Company that the Texas & Pacific Railway Company, under its own chartered name and organization, should, without impairing any existing right, exercise in addition thereto, all the powers, rights, privileges and franchises and own and control all the properties that the New Orleans Pacific Railway Company then exercised and owned, or by its charter and by-laws it had the right to exercise, own or control.
>
> Transcript, pp. 51-53.

VIII.

On the 11th day of July, 1882, the Council of the city of New Orleans adopted Ordinance 7946, Administration Series, reading as follows:

> "An ordinance supplementary to Ordinances 6695, 6732 and 6938, Administration Series, granting certain rights to the New Orleans Pacific Railway Company and its assigns, and providing for the selection of a site for the Claiborne market.
>
> Whereas, by Sec. 2 of Ordinance 6695, Administration Series, the right was given to the New Orleans Pacific Railway Company or its assigns to locate, construct and maintain an extension of its railroad through Claiborne street, with the right to construct a passenger depot on the neutral ground of Claiborne street, at or near the intersection of Claiborne street with Canal street, with a

proviso that should it become necessary for the building of the depot or laying tracks, to remove the Claiborne market, then the New Orleans Pacific Railway Company, or its assigns, should rebuild the same at their own expense, on such lots as the city shall designate, and,

Whereas, by Ordinances Nos. 6732 and 6938, Administration Series, certain rights have also been granted to said company and its assigns, with reference to the said Claiborne street and to Thalia street, and the company has built its road from Baton Rouge to New Orleans, crossing at Thalia street, and established its terminus in the city limits at Thalia street and the levee, and is preparing also to cross from Westwego to the City Park and thence to Claiborne street; now, therefore,

"SECTION 1. *Be it ordained by the Council of the city of New Orleans*, That the Administrator of Improvements, the Administrator of Commerce and the Administrator of Waterworks and Public Buildings be and they are hereby authorized and directed, within sixty days from the passage of this ordinance, to select such lots as may be needful and proper for a new site for said market; and when such selection shall have been made they shall deposit a *proces verbal* thereof in the office of the Administrator of Waterworks and Public Buildings.

"SEC. 2. *Be it further ordained*, That whenever said company or its assigns shall find it necessary to remove said building, it shall be rebuilt on said lots so selected, and as prescribed in said original ordinance.

"SEC. 3. *Be it further ordained*, That in crossing the New Canal, under its charter, and according to the said ordinances, the said railway company or its assigns shall do so by means of a proper drawbridge.

"Adopted by the Council of the city of New Orleans, July 11, 1882.

"JOSEPH A. SHAKSPEARE, Mayor.

"A true copy.

"GEO. W. FLYNN, Secretary."

Transcript, page 61.

IX.

Not only did the New Orleans Pacific Railway Company and its successor, the Texas Pacific Railway Company, fail to establish a terminus in the area bounded by the New Canal, Claiborne Canal and Carrollton Avenue in the city of New Orleans, an area completely enclosed by said boundaries, and to construct or control a line of railroad ready for public use from a crossing of the Mississippi river to the designated terminus, within two years from the date of the passage of Ordinance No. 6938 as required by Ordinances No. 6695, No. 6732 and No. 6938, Administration Series, but the New Orleans Pacific Railway Company and its successor, the Texas & Pacific Railway Company, up to the present time have never selected a point within said area for the location of a terminus, or located a terminus within said area as required by Ordinance No. 6695, Administration Series, have never extended any tracks from any point between the New Canal, Claiborne Canal and Carrollton avenue into and through Claiborne street to Canal street, as provided for by Ordinance No. 6695, Administration Series; have never constructed any passenger depot at or near the intersection of Claiborne street with Canal street, or purchased any lots to serve as a site for the Claiborne Market, as provided for by Ordinance No. 6695, Administration Series; have never laid any tracks across Claiborne Canal, into and through Thalia street, to the river front, as provided for by Ordinance No. 6732, Administration Series; have never paved, with granite blocks or other material any part of Thalia street, from Pilié to Rampart street, as provided for by Ordinance No. 6732, Administration Series; have never established a crossing for the road on the west bank of the river, from Westwego to a point in the vicinity of the Upper City Park, as provided for by Ordinance No. 6938, Administration Series; have never located or maintained a railway from a point on the river front in the vicinity of the Upper City Park, along the western border of the Upper City Park, from thence to the designated terminus east of Carrollton avenue, as provided for by Ordinance No. 6938, Administration Series; have never established any ferry facilities, wharves, piers, warehouses, yards, tracks, depots, stations, sheds, elevators or other structures on the strip or parcel of ground on the

river front of said Upper City Park, or the batture in front of said park, as provided for by Ordinance No. 6938, Administration Series; have never laid any tracks from said strip or parcel of ground, in front of said Upper City Park eastwardly along said river front, to connect with the belt road at Louisiana avenue, as provided for by Ordinance No. 6938, Administration Series, and have never paved any part of Pilié street, between Thalia and Terpsichore streets, or of Terpsichore street, between Pilié and Front streets, with granite blocks or blocks of compressed asphalt, as required by Ordinance No. 6938, Administration Series.

All that the New Orleans Pacific Railway Company and its successor, the Texas & Pacific Railway Company, as far as this case is concerned, have ever done, was to extend the railroad on the west bank of the Mississippi river between Westwego and Bayou Goula, purchased by the New Orleans Pacific Railway Company from the New Orleans, Mobile & Texas Railway Company, from Bayou Goula to a point in West Baton Rouge opposite the city of Baton Rouge and from Westwego to Gouldsboro, a point opposite Thalia street, in the city of New Orleans; to establish transfers and ferries from West Baton Rouge to the city of Baton Rouge, and from Gouldsboro, its actual terminus, to the foot of Thalia street in the city of New Orleans; to establish a landing at the foot of Thalia street in the city of New Orleans, and to erect there a brick freight depot and wooden passenger shed for freight and passenger business and an incline for the transfer of cars; to build above Thalia street three hundred feet of wharf at an expense of $5000, in lieu of the city wharf at Thalia street taken as a landing; to lay tracks at the landing at the foot of Thalia street along the river front, as high as Race street and down as far as the depots of the Louisville & Nashville Railroad Company, and Morgan's Louisiana & Texas Railroad in the neighborhood of Julia street; to send its officers in company with certain city officials, in the summer of 1882, to inspect certain lots thought suitable at that time for a site for the Claiborne market, when the removal of the market might be decided upon; to make, on that occasion, through its officers, the statement that the lots would be purchased, the market

would be taken down and another market put up, but that if this was not satisfactory to the city, the city should be silent for awhile, because the people, if they knew the railroad wanted the lots, would ask too much for them; to demand in the summer of 1883 from the City Surveyor lines and levels for a track on the river front from Louisiana avenue to Jackson street; to institute suit, on the 11th day of June, 1883, in the Civil District Court for the parish of Orleans, where the same is still pending, to compel by writ of *mandamus*, the City Surveyor to furnish lines and levels for a track along the river front, between Louisiana avenue and Jackson street; to pay $1000 rent for the two years ending March, 1882, and March, 1883, under the so-called lease of the batture in front of the Upper City Park, purported to have been granted by Ordinance No. 6938, Administration Series; to make a tender of $500 for rent under said so-called lease for the year ending March, 1884, and to acquire in private ownership four squares of ground adjoining the Upper City Park, two squares fronting the river and two in the rear thereof.

Transcript, pages 25, 43, 74, 84.

X.

On the 15th of April. 1884, the Council of the city of New Orleans adopted an ordinance known as No. 685, Council Series, reading as follows:

> An ordinance repealing certain sections of the Ordinance No. 6938, A. S., granting privileges to the New Orleans Pacific Railway Company.
>
> Be it ordained, That Sec. two (2) of the Ordinance No. 6938, A. S., passed March, 1881, granting to the New Orleans Pacific Railway Company a lease of the Upper City Park batture property, be and the same is hereby repealed and revoked.
>
> Adopted by the Council of the City of New Orleans, April 15, 1884. Approved April 24, 1884.
>
> M. McNAMARA, *Clerk of Council.*
> W. J. BEHAN, *Mayor.*

Transcript, p. 62.

XI.

On the 16th of June, 1886, the Council of the city of New Orleans adopted an ordinance known as No. 1828, Council Series, reading as follows:

An ordinance repealing certain rights granted to the New Orleans Pacific Railway Company under Ordinance 6695, A. S., adopted November 9, 1880; No. 6732, A. S., adopted December 2, 1880; No. 6938, adopted March 29, 1881; No. 7946, adopted July 11, 1882; and

Whereas, the city of New Orleans granted to the Pacific Railway Company the right to extend its tracks through Claiborne street to Canal, to erect a passenger depot on Claiborne street, near Canal street, construct tracks from Claiborne street to and through Thalia street to the river; and

Whereas, the original grantee company has merged its identity with that of an alien corporation, which itself is now in the hands of a receiver appointed on the prayer of an alien corporation; and

Whereas, such rights were granted on various conditions which have not been complied with, and the delay for so doing has elapsed; and

Whereas, by the acts of said New Orleans Pacific Railway Company such rights have been abandoned, and it is necessary for the public good that Claiborne street, between Common street and the Old Basin, shall be used for steam and horse railway and depot purposes;

Therefore, be it ordained by the Council of the city of New Orleans, that all rights of way on Claiborne street, rights to establish a passenger depot on said street, and rights to connect any steam or other railway by the New Orleans Pacific Railway Company through or on Claiborne street, or to erect any depot thereon, whether acquired through or by the ordinances above enumerated or through or by any other ordinance of the Council of the city of New Orleans, be and the same are hereby repealed and revoked.

Adopted by the Council of the city of New Orleans, June 8, 1886.

W. H. MICHEL,
Assistant Clerk of Council.
Approved June 16, 1886.

A true copy: D. M. KILPATRICK, Mayor *pro tem.*
TH. BUISSON, Secretary to the Mayor.

Transcript, pages 62, 63.

XII.

On the 2d day of July, 1886, John C. Brown and Lionel A. Sheldon, receivers of the Texas & Pacific Railway Company, and the Fidelity Insurance Trust and Safe Deposit Company, filed a bill of complaint in the Circuit Court of the United States for the Eastern District of Louisiana.

This bill alleged the incorporation of the Texas & Pacific Railway Company under certain acts of Congress, the acquisition by the Texas & Pacific Railway Company of all the property and franchises of the New Orleans & Pacific Railway Company, the appointment of John C. Brown and Lionel A. Sheldon receivers of the Texas & Pacific Railway Company, the adoption by the city of New Orleans of Ordinance No. 6695, Administration Series, on November 9, 1880; Ordinance No. 6732, Administration Series, on December 3, 1880; Ordinance No. 6938, Administration Series, on March 29, 1881; the full and fair compliance by said New Orleans & Pacific Railway Company and the Texas & Pacific Railway Co. with the conditions imposed by said ordinances; the adoption of Ordinance No. 7946, Administration Series, averred to be an acknowledgment by the city of said compliance; the repealing ordinances, No. 685, Council Series, adopted April 24, 1884, and No. 1828, Council Series, adopted June 8, 1886; the violation by the adoption of said ordinances, No. 685, Council Series, and No. 1828, Council Series, of the contract created by Ordinances No. 6695, Administration Series, 6732, Administration Series, and 6938, Administration Series, and prayed that Ordinances No. 685, Council Series, and No. 1828, Council Series, be adjudged and decreed to be illegal and injurious to complainants, and be canceled, and the right of the Texas & Pacific Railway Company, under Ordinance No. 6695, Administration Series, to lay its tracks and build a passenger depot on the neutral ground of Claiborne street, near Canal street, and to remove the Claiborne market, be declared and decreed, and its right to the lands of said Park batture, under the second section of Ordinance No. 6938, Administration Series, be declared and decreed; and its right to have lines furnished by the proper official of the city for its route from

Louisiana avenue to Jackson street, along the river front, under the third section of said ordinance, be declared and decreed and specifically enforced.

That the City of New Orleans be enjoined and restrained from in any wise executing Ordinance No. 685, Council Series, and Ordinance No. 1828, Council Series, and from granting to any other person or corporation the rights sought to be taken away by said Ordinances Nos. 685 and 1828, Council Series

Transcript, pages 1 to 9.

XIII.

On the first day of November, 1886, the city of New Orleans filed its answer to said bill of complaint.

This answer admitted, the incorporation of the Texas & Pacific Railway Company, the incorporation of the New Orleans Pacific Railway Company; the contract entered into between the New Orleans Pacific Railway Company and the Texas & Pacific Railway Company, averring, however, the effect of said contract to be that the Texas & Pacific Railway Company was held and bound to all the obligations imposed upon the New Orleans Pacific Railway Company, and was affected by all the equities existing between the New Orleans Pacific Railway Company and the city of New Orleans, the appointment of John C. Brown and Lionel A. Sheldon as receivers, the adoption of Ordinance No. 6695, Administration Series, on the 9th of November, 1880; Ordinance No. 6732, Administration Series, on December 3, 1880; Ordinance No. 6938, Administration Series, on March 29, 1881; and said bill averred the failure on the part of complainants to comply with the obligations imposed by said ordinances, the nullity of the lease of the batture in front of the Upper City Park, purported to be granted by Ordinance No. 6938, Administration Series, the nullity of the grant of the right to build a depot on the neutral ground of Claiborne street, said batture in front of said park and said neutral ground being dedicated to public use, and the legality of the repealing ordinances, 685 and 1828, Council Series.

Transcript, pages 11 to 15.

XIV.

On the 3d of February, 1887, the complainants filed a supplemental bill. This supplemental bill alleged that under the ordinance set forth in the original bill of complaint, the wharf of the Texas & Pacific Railway Company, its transfers and incline between Thalia and Terpsichore streets, at New Orleans, had been duly constructed and used for about five years, and in like manner and during the same time the tracks of said railway, connecting its transfer facilities and its depots and sheds at its Thalia street terminus, had been laid and used in Pilie and Water streets, and along the river front from Thalia street up to about Race street. That it had become necessary for the business of said railway to lay a small spur track to connect said wharf above the transfer slip with the said tracks on Pilie and Water streets; that the complainants had applied to the City Surveyor for lines and levels of said spur track; that the City Surveyor refused to grant said lines and levels under a certain resolution of the Council of September 15, 1885, prohibiting him from giving any lines for such work in the street without submitting the question to the Council; that said resolution was illegal and a breach of complainant's contract, and that interference by the Mayor of the city with complainant's building said spur track was apprehended.

Upon these allegations a writ of injunction was prayed for, restraining the city from interfering with complainants in the work of building said spur track to connect the wharf above the transfer incline between Thalia and Terpsichore streets with the tracks of the railway between Thalia and Water streets, along the river front, and in the work of strengthening and filling up said wharf and driving piling to reach the same with said spur, and for a decree as prayed for in their original bill.

Upon this supplemental bill a restraining order was granted which, by agreement, was to stand as an injunction pending suit.

Transcript, pp. 16 to 18, p. 20.

XV.

On the 23d day of June, 1891, a final decree in favor of complainants, granting in full the prayer of their bill, was rendered.

From this judgment the city of New Orleans appeals.

Transcript, pp. 87, 88.

ASSIGNMENT OF ERRORS.

I.

The obligations imposed by Ordinances Nos. 6695, 6732 and 6938, A. S., upon the New Orleans Pacific Railway Company to establish its terminus within the area bounded by the New Canal, Claiborne Canal and Carrollton Avenue, and to construct or control a line of railway from a crossing of the Mississippi river to its designated terminus, within two years from the date of the adoption of Ordinance No. 6938, namely, the 29th of March, 1881, were conditions *precedent*, or in the language of the law of Louisiana, *suspensive* conditions upon the happening of which only the grants made to the company by said ordinances were to take effect.

II.

Neither the New Orleans Pacific Railway Company, nor its successor, the Texas & Pacific Railway Company, complied with the conditions *precedent* or *suspensive* imposed by Ordinances Nos. 6695, 6732 and 6938, A. S., and the grants made by said ordinances never took effect.

III.

The city of New Orleans never made any waiver, express or implied, or did any act which impaired or modified the legal effect of the failure on the part of the railway companies to comply with the conditions *precedent* or *suspensive* imposed by Ordinances Nos. 6695, 6732 and 6938, A. S.

IV.

The repealing ordinance, No. 1828, Council Series, rendered it legally impossible, from the date of its adoption, for the railway companies to construct any railway or build any depot on Claiborne street.

V.

The grants purported to be made to the New Orleans Pacific Railway Company by Sec. 2 of Ordinance No. 6695, A. S., of a right to build a passenger depot on Claiborne street, by Sec. 2 of Ordinance No. 6938, A. S., of the lease for ninety-nine years of the strip of ground and batture in front of the Upper City Park, with the right to there establish and maintain ferry facilities, wharves, piers, warehouses, yards, tracks, depots, stations, sheds, elevators, and other structures, and to exclude from its wharves at that point vessels not its own nor upon its business; by Sec. 4 of Ordinance No. 6938, C. S., to enclose and occupy, for its purposes and uses, that portion of the levee, batture and wharf in front of its riparian property between Thalia and Terpsichore streets, and to erect and maintain thereon ferry facilities, wharves, piers, warehouses, elevators, yards, tracks, depots, stations, sheds and other structures, and to exclude from its its wharves, at that point, all vessels not its own nor upon its business were *ultra vires*, null and void.

ARGUMENT.

I.

Early in the history of the jurisprudence of Louisiana the Supreme Court of that State, in speaking of conditions precedent, declared:

> They are recognized and provided for by our system of jurisprudence, and by every other that has in view the ordinary transactions of men. The obligation is conditional, when it *depends* on a future or uncertain *event*, says our Code. The *event* then must be shown, to make the obligation binding on the party against whom it is pre-

sented. For until it takes place he is not bound to perform what he has promised (*C. Code*, 272, Art. 68). There is an exception to this rule in regard to the dissolving condition, but in relation to all others it is true, and it is a matter of no moment whether we say the obligation is *suspended* until the condition is performed—or that the performance of the condition must *precede* the execution of the obligation (*C. Code*, 274, *Art.* 81 and 3; *Toullier, Droit Civil Francaise, liv. 3, tit. 3, Chap. 4, No. 472*; Pothier, *Traité des Ob.*, No. 202.)

Connell vs. Hope Insurance Co., 3 Martin, N. S. 226.

Article 2021 of the Revised Civil Code of Louisiana, which has taken the place of Art. 68 of the Code of 1808, says:

> Conditional obligations are such as are made to depend on an uncertain event. If the obligation is not to take effect until the event happen, it is a suspensive condition; if the obligation takes effect immediately, but is liable to be defeated when the event happens, it is then a resolutory condition.

Article 2043 of the Revised Civil Code, which is an aemnd ment of Article 81 of the Code of 1808, says:

> The obligation contracted on a suspensive condition is that which depends either on a future and uncertain event or on an event which has actually taken place without its being yet known to the parties.
>
> In the former case the obligation can not be executed till after the event; in the latter, the obligation has its effect from the day on which it was contracted, but it can not be enforced until the event is known.

Article 2045 of the Revised Civil Code, which corresponds with Article 83 of the Code of 1808, says:

> The dissolving condition is that which, when accomplished, operates the revocation of the obligation, placing matters in the same state as though the obligation had not existed.
>
> It does not suspend the execution of the obligation; it only obliges the creditor to restore what he has received, in case the event provided for in the condition takes place.
>
> The effect of a *suspenisve* condition, as its name necessarily implies, is to suspend the obligation until the con-

> dition is accomplished or considered as accomplished; till then nothing is due, there is only in expectation that what is undertaken will be due; *pendente conditione non dum debetur, sed spes est debitumiri.*
>
> Pothier, Traité des Ob., No. 218.

That the conditions finally formulated by Section 6 of Ordinance No. 6938, A. S. that the New Orleans Pacific Railway Company should

> construct or control a line of road, ready for public use from a crossing of the Mississippi river to its *designated* terminus within two years from the promulgation of this ordinance

is apparent.

In the case of Mill Dam Foundry vs. Hovey, 21 Pickering (Mass.), 440–42, the Supreme Court of Massachusetts approved the general views of law expressed by the trial judge in stating the rules to be followed in order to construe a stipulation on one side, to be a condition precedent to an obligation to perform on the other side. The general propositions laid down by the trial judge were:

> 1. That the undertaking on one side is in *terms* a condition to the stipulation on the other; as where one stipulates that he will perform the thing to be done if the other shall have first performed some stipulation on his part; and even when words are used which might be construed to be a condition in their ordinary sense, they shall not be so considered if such construction is not consistent with the intent of the parties (*Storer* vs. *Gordon*, 3 Maule and Selw, 308). The rule laid down in *Ritchie* vs. *Atkinson*, 10 East, 295, and *Atkinson* vs. *Ritchie*, *Ib.* 530, is this: That whether a thing be a condition precedent depends on the reason and sense of the thing as it must have been understood by the parties, and it is to be collected from the whole contract; or
>
> 2. It must result from the nature of the acts to be done and the order in which they must necessarily precede and follow each other in the progress of performance. When the act of the one party must necessarily precede any act of the other, as when one stipulates to manufacture an article from materials to be furnished by the other, and the other stipulates to furnish them, the

act of furnishing the materials necessarily precedes the act of manufacturing and will constitute a condition precedent, without express words (Thomas vs. Cadwallader, Willes, 496). But when the act of one is not necessary to the act of the other, though it would be convenient, useful or beneficial, yet as the want of it does not prevent performance, and the loss and inconvenience can be compensated in damages, the performance of the one is not a condition to the obligation to perform by the other; or

3. The non-performance on one side must go to the entire substance of the contract and to the whole consideration, so that it may safely be inferred as the intent and just construction of the contract, that if the act to be performed on the one side is not done, there is no consideration for the stipulations on the other side. And therefore, though there be a breach of an express or implied covenant on one side, attended with some loss or damage to the other, yet if it does not go to the whole consideration, and the loss can be compensated in damages, the stipulation must be construed to be independent, for breach of which the party sustaining such loss has his remedy by action, but it is not a condition precedent, upon the non-performance of which the other party is absolved from the performance of the stipulations on his part.

Also, Knight vs. New England Worsted Co., 2 Cushing (Mass.), 286.

Let us now apply these tests to the instant case.

1st.

The New Orleans Pacific Railway Company was a corporation of the State of Louisiana, owing its existence to and exercising its franchises and privileges under the laws of that State. The object of its incorporation was to construct a railway beginning at a point on the Mississippi river at New Orleans, or between New Orleans and the parish of Iberville, on the right bank of the Mississippi, and Baton Rouge on the left bank, or from New Orleans or Berwick's Bay, via Vermilionville, in the parish of Lafayette, and Opelousas, in the parish of St. Landry, or from any of said points, or from any point

within the limits of this State, and running thence toward and to the city of Shreveport or the city of Marshall or Dallas, in the State of Texas (Transcript, page 45).

Under the seventh section of Art. 3 of its charter, it was authorized to obtain, by grant or otherwise, from any parish, city or village within the State, any rights, privileges or franchises that any of said parishes, cities or villages might choose to grant in reference to the construction, maintenance, management and use of the railroads of said company, its depots, cars, locomotives and its business within the limits of such or any of said parishes, cities and villages (Transcript, page 47).

At the instance of the New Orleans Pacific Railway Company, which then owned or controlled no railway, but which was as appears by the preamble of the ordinance, then desirous of constructing a line of road on the east bank of the Mississippi from a crossing near Baton Rouge to some point in the city of New Orleans, between the New Canal and Melpomene street, and of establishing its terminus at such point, on *condition* that the city would grant it the right to extend its tracks from such terminus north of Claiborne Canal to Canal street, for passenger purposes, and also the right to extend its tracks from such terminus north of Claiborne Canal by the most convenient and practicable route through the public streets to the river front, for freight purposes, the city of New Orleans, on the 9th day of November, 1880, adopted Ordinance No. 6695, A. S. (Transcript, p. 54).

The evident object of the City of New Orleans in adopting the ordinance and in making to the New Orleans Pacific Railway Company the grants therein contained was to secure to itself permanently not only the general advantages which would result from the building of a railway connecting with the city, but the special advantages which would result to that particular section of its territory where it desired the actual terminus of the railway, with the accessory depots, shops, yards, warehouses and other structures, to be located (Transcript, page 54).

It therefore designated by Section I of the ordinance the

territory within which the company should locate its terminus, namely, the area bounded by the New Canal, Claiborne, Canal and Carrollton avenue (Transcript, page 54).

The boundaries of the territory designated by the ordinance as that within which the terminus of the road should be located form a complete enclosure (Transcript, p. 77, Map marked R No. 4 in original).

So particular was the city that the terminus should be located as provided for by Sec. 1 of the ordinance, that by Sec. 4 it expressly declared that the grants made by the ordinance

> are granted only on condition and in consideration that the said grantees shall permanently establish the terminus of said road within the city limits and maintain said terminus during the existence of the charter of said company, for which period said right of way and privileges shall last; and should the said company at any time hereafter abandon its said road on the east side of the Mississippi river and its terminus within the city limits, then this grant shall cease and terminate and be without force or effect from the date of such abandonment * * * and it is still further made a condition of this grant that said railway company shall complete its road from the crossing at or near Baton Rouge to its terminus in this city within *two years* from the promulgation of this ordinance.

Section 4 of Ordinance No. 6695, A. S., contained both conditions precedent and conditions subsequent, or in the language of the Code of Louisiana, suspensive conditions and resolutory conditions.

The establishment of the terminus within the designated territory, and the building of the railway on the east bank of the river from the crossing at or near Baton Rouge to the terminus, within two years from the date of the promulgation of the ordinance, were conditions *precedent* or *suspensive* conditions. If the terminus was not established or the road not connected with it within the two years the grants made by the ordinance never took effect.

The removal of the terminus after its establishment, or the abandonment of the road on the east bank of the river after its construction, were conditions *subsequent* or *resolutory*

conditions, on the happening of which would terminate the grants made by the ordinance.

Under Ordinance No. 6695, A. S., if the New Orleans Pacific Railroad Company built a railway on the east side of the Mississippi from Baton Rouge to a terminus in the designated area, within two years from the 9th of November, 1880, which was the condition upon and the consideration for which the city made to it the grant of the privileges it sought, then, and then only, would the company have the grant of the right to extend its tracks through Claiborne street to Canal street, from Claiborne street, through a street to be selected, to the river front, through Front, Water and Pilié streets, and along the river front, between Jackson and Julia streets, and to erect at Claiborne and Canal streets a passenger depot, after obtaining a new site for the Claiborne market and removing the market thereto.

Ordinance, No. 6732 A. S., was adopted by the City Council on the 3d of December, 1880, simply to complete the conditional grant made by Ordinance 6695, A. S., by locating the street through which the railway of the New Orleans Pacific Railway Company might reach the river front from Claiborne street. This the ordinance did by granting a right of way, for freight purposes, through Thalia street upon the supplemental condition that the company should pave Thalia street, from Pilié street to Rampart street, with granite blocks.

The city, however, in order to avoid all question as to the nature of even this grant, inserted in full in the ordinance the language relative to the establishment of the terminus and to the building of the railway on the east bank of the river to the terminus within two years, contained in Sec. 4 of Ordinance No. 6695, A. S. (Trans., pp. 56, 57).

The fact that the New Orleans Pacific Railway Company, in 1881, abandoned the idea of ever building its railway on the *east* bank of the Mississippi river, and purchased a road which had been constructed by the New Orleans, Mobile & Texas Railroad Company on the *west* bank of the river, between Bayou Goula and Westwego, necessitated another grant from the city.

The abandonment, in 1881, by the company of all intention of ever building a road on the *east* bank of the river was tantamount to a failure to build a road on the *east* side of the river within two years from the date of Ordinance 6732, A. S., and the privileges granted by Ordinances No. 6695, A. S., and 6732, A. S., were under Sec. 4 of Ordinance No. 6695, A. S., and Sec. 2 of Ordinance No. 6732, A. S., no longer available.

Ordinance No. 6698, A. S., was, therefore, on the 29th day of March, 1881, adopted. There was, at the date of the adoption of this ordinance, no question raised as to a change of location of the terminus of the railway; on the contrary, all parties in interest understood that the location, originally fixed by Ordinance No. 6695, A. S., was definitely fixed; the matter to be determined, as appears by the preamble of the ordinance, was the adjustment of the lines of the railway through the city to its designated terminus, so as to meet the altered condition of affairs resulting from the fact that the company's railway was to be on the *west* instead of on the *east* bank of the river.

Section 1 of the ordinance, therefore, provided that the railway should be built—

> From such point on the river front as its crossing from Westwego, shall be located at, in the vicinity of the Upper City Park, along the western border of the said City Park and from thence by the best and most practicable route to its designated terminus east of Carrolton avenue.

Ordinance No. 6938, A. S., then made certain other grants: a ninety-nine-year lease of a strip of ground and batture in the front of the park, with the right to establish and maintain thereon ferry facilities, wharves, piers, warehouses, yards, tracks, depots, stations, sheds, elevators and other structures as might be necessary and convenient for the transfer of cars, engines, passengers and freight, or in the transaction of its business, and a right to exclude from its wharves all vessels not its own and not upon its business; the right to extend its track from the park eastwardly along the river to connect with the Belt road at Jackson street and with tracks author-

ized to be constructed between Jackson and Julia streets, by Sec. 3 of Ordinance 6695, A. S., and by Ordinance No. 6732, A. S.; the right to enclose for its own uses and purposes that portion of levee, batture and wharf in front of its private riparian property, acquired or to be acquired, between Thalia and Terpsichore streets; to erect and maintain thereon, at its own expense, ferry facilities, wharves, piers, warehouses, elevators, yards, tracks, depots, stations, sheds and other structures as might be necessary or convenient for the transfer of cars, engines, passengers and freight, and in the transaction of its business, and to exclude from its wharves all vessels not its own, or upon its business, this grant of privileges at Thalia street being coupled with the supplemental obligations to build for the city three hundred feet of new wharf between Terpsichore and Jackson streets, in lieu of the city wharf at Thalia street to be taken by the company, and to pave Pilié street between Thalia and Terpsichore streets, and Terpsichore street between Pilié and Front streets with square blocks of granite or with blocks of compressed asphalt.

Transcript, pp. 58 to 60.

The privileges granted by Ordinance No. 6938, A. S., at Thalia street were more liberal than those allowed by Ordinance No. 6732, in this, that the company was allowed to handle passengers as well as freight, and to have ferry landing, transfer and depot facilities at that point.

All the privileges, however, either revived or newly granted by Ordinance No. 6938 were like those originally granted by Ordinances Nos. 6695, A. S., and 6732, A. S., *expressly* based by Sec. 6 upon the conditions precedent or suspensive that the New Orleans Pacific Railway Company should establish its terminus within the city limits, and that the company should—

> construct or control a line of road, ready for public use, from a crossing of the Mississippi river to its *designated* terminus within two years from the promulgation of this ordinance.

and upon the condition subsequent or resolutory that if the

company removed the terminus, after its establishment, the grant should lapse.

2nd.

There can be no doubt that the acts to be done by the New Orleans Pacific Railway Company, under Ordinances Nos. 6695, 6732 and 6938, A. S., were of such a nature that they necessarily had to be done before the grants made by the city could take effect.

The grants of the rights of way on Claiborne, Front, Water and Pilié streets and along the river front between Julia and Jackson streets, contemplated by Ordinance No. 6695, A. S., and of the rights of way through Thalia street across the Claiborne Canal to the river front were vain things until the New Orleans Pacific Railroad Company should build or control a railway reaching to the city of New Orleans, and at the dates of the adoption of these ordinances the New Orleans Pacific Railway Company, neither owned nor controlled any railway. Moreover, while it may be contended that grants of rights of way through streets of the city might have been availed of by the New Orleans Pacific Railway Company on the 29th of March, 1881, the date of the adoption of Ordinance No. 6938, A. S., because at that date the company owned a road on the *west* bank of the river between Bayou Goula and Westwego, it must be remembered that Ordinance No. 6938, A. S., contemplated the grant of a right of way

> From a point on the river front as its crossing shall be located at, in the vicinity of the upper City Park along the western border of the said City Park and from thence by the best and most practicable route to its designated terminus east of Carrolton avenue.

A right of way to a terminus to be established at a point within certain territory by the railway company was of no use before the terminus was established or the point for its location even selected.

Again, the only right ever contemplated to be granted to the New Orleans Pacific Railway Company on Claiborne

street was that provided for by Sec. 2 of Ordinance No. 6695, A. S., namely, a right to locate, construct and maintain an *extension* of its railway from its designated terminus, into and through Claiborne street to Canal street, and the only rights ever contemplated on Thalia, Front, Water and Pilié streets, and along the river front, between Julia and Jackson, were those provided for by Sec. 3 of Ordinance No. 6695, A. S., and Sec. 1 of Ordinance No. 6732, A. S., namely, rights to locate, construct and maintain *extensions* of its railway across the Claiborne Canal, through Thalia, Front, Water and Pilié streets and along the river front between Julia and Jackson streets.

It would have been equally impossible to have built an *extension* of a railroad through Claiborne street from a terminus which had no existence, and to build an *extension* from Claiborne street, through Thalia street to the river front, of a railway which had never been constructed.

This being so, the right contemplated by Sec. 3 of Ordinance No. 6938, A. S., to extend tracks from the Upper City Park to connect with the tracks authorized by Sec. 3 of Ordinance No. 6695, A. S., and Sec. 1 of Ordinance No. 6732, A. S., were also of no avail.

The location of a terminus within the designated territory and the connection therewith of a line of railway was, under the plan, necessarily antecedent to the furnishing by the city surveyor, as provided for in the ordinances, of lines and levels for the construction of any part of the railway.

3d.

The location by the New Orleans Pacific Railway Company of its terminus within the area bounded by the New Canal, the Claiborne Canal and Carrollton avenue and the connection therewith, within two years from the date of the adoption of Ordinance No. 6938, A. S., of a railway was the *consideration* for which the grants were to be given effect. Such were the very terms of the contract and the contract was the law between the parties.

Section 4 of Ordinance No. 6695, A. S., and Sec. 2 of Ordinance 6732, A. S., expressly declare that the right of way, franchises and privileges are granted—

> Only on condition and *in consideration* that the grantees shall permanently establish the terminus of said road within the city limits.
>
> * * * * * * *
>
> And it is still further made a condition of this grant that said railway company shall complete its road from the crossing of the Mississippi river, at or near Baton Rouge, to the terminus in this city, within two years from the promulgation of this ordinance.

The language of Sec. 6 of Ordinance No. 6938, A. S., is:

> That the grant of the right of way, franchises and privileges herein and heretofore granted to the New Orleans Pacific Railway Company are and were granted on condition and in *consideration* that the said grantee shall permanently establish its terminus within the city limits * * * and the further condition that said railway company shall construct or control a line of road, ready for public use, from a crossing of the Mississippi river to its designated terminus in this city within two years from the promulgation of this ordinance.

As the contract itself stated that the location of the terminus was the consideration for the grants, the objects had in view by the city in designating the particular location of the terminus are properly of no concern in this discussion. The location of the terminus within the territory pointed out was expressly stated to be vital for the grants, and the failure to so locate it prevented the grants from taking effect.

However, as we have heretofore said, the city evidently had in view the development of a certain section of its territory, as well as the extension of a line of railway to its limits. The area between the New Canal, Claiborne Canal and Carrollton avenue being in the rear of the city and sparsely populated would have been benefited by the establishment of railway depots, shops, yards, warehouses and other structures. The employees of the railway company would naturally have sought residences in the neighborhood of their place of

employment, and the building and occupation of houses and the opening of stores and other business places in the locality would have followed.

The loss to the city of New Orleans from the failure on the part of the New Orleans Pacific Railway Company to establish its terminus within the designated area is one for which no remedy in damages would be adequate.

II.

It is not contended in this case that within two years from the date of the adoption of Ordinance No. 6938, A. S.—namely, the 29th of March, 1881, the New Orleans Pacific Railway Company or its successor, the Texas & Pacific Railway Company, established a terminus in the area bounded by the New Canal, Claiborne Canal and Carrollton avenue, and connected with said terminus a line of railway from a crossing of the Mississippi river.

The failure to do these things within the two years was absolute, and the fact is that up to this date no indication to establish the designated terminus or to connect a line of railway therewith has ever been given by the complainants.

Indeed, as appears by the testimony of E. B. Wheelock, late president of the New Orleans Pacific Railway Company, the idea of locating the design ated terminus was abandoned or at best regarded as a remote contingency.

Testimony of E. B. Wheelock, Transcript, pages 32, 35, 64.

The only contention of the complainants is that they complied with the obligations imposed by Ordinances Nos. 6695, 6732 and 6938, A. S., by extending within two years, from 29th March, 1881, the road on the west bank of the river from Westwego to Gouldsboro, by establishing a landing, a brick freight depot and a wooden passenger shed at Thalia street, by laying for its own convenience in making connections with other railways, tracks on the river front between Julia and Race streets, and by building three hundred feet of waarf in compensation for the city's wharf, of which possession was taken.

Testimony of E. B. Wheelock, Transcript, p. 64.

Article 2138 of the Revised Civil Code of Louisiana is to the effect that—

> If the debtor give a thing in payment of his obligation, which he has no right to deliver, it does not discharge his obligation (Art. 2150, Revised Civil Code).

Yet the complainants are asking the Court to decree, in utter disregard of the very terms of the contract and in violation of all law and equity, that the establishment of a landing place, which is not a terminus, in the true sense of that word, and which is certainly not the terminus, the establishment of which was made, by the contract, a condition precedent or suspensive to and a consideration for the grants covered by the contract, was a full compliance with the obligations, upon the performance of which the very existence of the grants depended.

The establishment of the landing at Thalia street and the laying of tracks on the river front between Julia and Race streets were exercises of the grants in anticipation of the performance, within two years, of the conditions precedent or suspensive, which would have constituted part performance of the contract had the conditions precedent or suspensive of the contract been complied with within the term, but which, in no way, constituted a performance of the conditions or gave to the grantees any contract right to the continued use of said landing or tracks after their failure to comply with the conditions within the term.

> The debtor can not oblige the creditor to receive in part the payment of a debt, even divisible (Article 2153, Revised Civil Code).

The question whether the complainants have any rights, as licensees, to the present or future use of the landing at Thalia street and of the tracks on the river front, between Julia and Jackson streets, will only need discussion when the city actively interferes with such use. No evidence now exists that the city intends any interference with the use of the landing or tracks, and it is sufficient to say that if complain

ants have acquired any license, such license is by its nature revocable at the discretion of the city.

III.

The contention of complainants that the declaration in the preamble of Ordinance No. 7946, A. S., to the effect that the railway company—

> has built its road from Baton Rouge to New Orleans, crossing at Thalia street, and established its *terminus* in the city limits at Thalia street and the levee

constitutes a waiver on the part of the city of the right to insist that the failure of the railway company to establish the terminus in the area bounded by the New Canal, Claiborne Canal, and Carrollton avenue, within two years from 9th November, 1880, and was, in effect, an amendment of the contract substituting Thalia street as the terminus of the road instead of the location originally fixed, is entirely without merit.

The very words of the preamble of the ordinance following those last above quoted, namely:

> and is preparing to cross from Westwego to the City Park and thence to Claiborne street,

negative such an interpretation of the ordinance.

The city, when adopting Ordinance 7946, A. S., had still in contemplation the location of the terminus in the rear of the city, and the railway company, having adduced evidence to prove that the declarations contained in the preamble of the ordinance were true must be held to have still intended at the date of the adoption of the ordinance, to comply with its obligations by establishing the terminus of the road in the territory embraced by the New Canal, Claiborne Canal and Carrolton avenue.

Testimony of E. B. Wheelock, Transcript, pages 26 to 64.

What took place between officials of the city and the officers of the road in the summer of 1882, relative to the location of a site for the Claiborne Market is of no importance. The city in 1882 was not obliged to point out a site for the market

because the alleged right in the railway company to place a depot on Claiborne street was not then in existence, the condition precedent or suspensive to such alleged right not having been performed.

Besides it appears by the record that if there was any failure on the city's part to locate a site for the market, and even this is very doubtful, the fault that the site for the market was not located was the railway's rather than the city's.

Testimony of E. B. Wheelock, Transcript, pp. 30–31.

The controversy in May, 1883, between the City Surveyor and the railway officials, concerning lines and levels for tracks between Louisiana avenue and Jackson street, is equally unimportant. It is sufficient to notice that the City Surveyor finally refused to furnish the lines and levels, because it was disputed by some members of the City Council whether the railroad company had a right to have the lines made and the track go down that street.

Testimony of E. B. Wheelock, Transcript, pp. 28–29.

IV.

Ordinance No. 1828, C. S., which was adopted on the 16th of June, 1886,

> expressly repealed all rights of way on Claiborne street, rights to establish a passenger depot on said street, and rights to connect any steam or other railway by the New Orleans Pacific Railway Company through or on Claiborne street, contemplated by Ordinances Nos. 6695, 6732 and 6938, A. S.

The tracks on Claiborne street were, by the terms of the contract, to be *extensions* from the terminus, between the New Canal, Claiborne Canal and Carrollton avenue, but the terminus, although under the terms of the contract it was to have been established within two years from the 29th of March, 1881. was not at the date of the adoption of Ordinance No. 1828, C. S., in existence.

The failure of the railway company to establish the terminus within the time fixed made it impossible for the new

company to make the extensions and, the legal effect of the repealing ordinance was to withdraw from under the contract the power of making the extensions subsequent to the adoption of the repealing ordinance.

This case, in this respect, is similar to the case of Market Company, Limited, vs. City, 47 An. 205, 214, decided by the Supreme Court of Louisiana in 1895.

The repeal of the grants on Claiborne street, connected as the line on that street was with the *extensions* through Thalia street and along the river front, was a substantial repeal of the latter.

V.

The city of New Orleans does not contend that it was incompetent for its Council to grant to the New Orleans Pacific Railway Company rights of way through Claiborne, Thalia, Front, Water and Pilié streets, and along the river front, between the Upper City Park and Julia street or over the levee and batture in front of the city.

Such grants are mere grants of the right of passage and are within the city's power of administration over streets and public places.

Brown vs. Duplessis, 14 An. 842.

Board of Liquidation vs. City, 32 An. 917.

Harrison vs. Railway Company, 34 An. 462.

The grants purported to have been made to the New Orleans Pacific Railway Company by Section 2 of Ordinance No. 6938, A. S., of a ninety-nine-year lease of a strip of ground and batture in front of the Upper City Park, with the right to construct thereon ferry facilities, wharves, piers, warehouses, yards, tracks, depots, stations, sheds, elevators and other structures, with the right to exclude from the wharves at that point vessels not its own or not upon its business, and by Section 4 of the same ordinance of the right to enclose and occupy for its purposes and uses that portion of the levee, batture and wharf in the city of New Orleans in front of its riparian property acquired or to be acquired between Thalia and Terpsichore streets, and to ereet and maintain thereon, at

its own expense, ferry facilities, wharves, piers, warehouses, elevators, yards, tracks, depots, stations, sheds and other structures, with the right to exclude from its wharves at that point vessels not its own nor upon its business, were intended, however, to have a much larger effect than the conveyance of rights of way or passage.

These sections of Ordinance No. 6938, A. S., import the grant of rights of occupation and of private use and possession of portions of the river front and batture, and are identical with the grant by the city to the Illinois Central Railroad Company declared by the Supreme Court of Louisiana, in the recent case of the Louisiana Construction and Improvement Company *et als.* vs. Illinois Central Railroad Company *et al.*, 49 An., page 527, to be *ultra vires*, null and void.

As the decision referred to, which, for the convenience of the Court is printed in full as an appendix to this brief, contains so full a discussion of all the law on the subject and considers in detail so many adjudicated cases, we submit, upon its authority, and upon the authority of the cases there cited, that Secs. 2 and 4 of Ordinance No. 6938, A. S., were without legal effect *ab initio*.

In this connection the attention of the court is however called to the fact that by Act No. 48 of the General Assembly of Louisiana of the year 1871, amending Act No. 7 of the extra session of 1870, the charter of the city in force at the date Ordinances Nos. 6695,6732 and 6938, A. S., were adopted, provisions prohibiting the lease by the city of ferry privileges beyond a term of three years, or of wharves or landings, for a longer term than ten years and of either except upon adjudication, were provided.

Transcript, page 74.

The Court will also notice that, though the writer took in the case last cited the position that the grant to the railway company by the city, while not binding as a contract, was valid as a license, revocable at the city's pleasure, the Supreme Court of Louisiana did not even give the ordinance in question such effect, and left it doubtful whether the city by changing the form of the ordinance could grant to the rail-

road company a revocable license embracing the same objects, and did this at a date when the warehouses, sheds, elevators, buildings and structures of the railway company were accomplished facts. The case in which the decision was rendered is now pending on its merits, but the principles of law announced by the court are finally approved.

Section 2 of Ordinance No. 6928, A. S., is also *ultra vires* for other reasons than those given in the Louisiana Construction and Improvement Company's case.

The strip of ground in front of the Upper City Park forms part of the park, and the batture in front of the strip was an accessory to the strip and to the park.

Testimony of E. B. Wheelock (recalled), Transcript, pages 64 and 65.

Articles 504 and 509, Revised Civil Code.

The Upper City Park, up to the edge of the Mississippi river, was, from the date of its acquisition by the commissioners of the New Orleans Park, on the 16th of August, 1871, dedicated to particular public use as a public park, under Act No. 83 of the Extra Session of the General Assembly of Louisiana of 1871.

Certificate, Transcript, pages 66, 67.

Sketch marked "Batture 1," pages 66, 67.

Testimony of E. B. Wheelock (recalled), pages 64, 65.

If the dedication of the strip of ground and batture in front of the park to particular public use as part of the park relieved it from the general public use common to all riparian property in the city of New Orleans, a question unnecessary to discuss, it did not make it less insusceptible of reduction to private use, for only the sovereign can change the destination of property dedicated to particular public use.

Mayor vs. Hopkins, 13 La. 331.

The grant purported to have been contemplated by Sec. 2 of Ordinance No. 6695, A. S., of the right to build a passenger depot at or near the intersection of Claiborne and Canal streets was also null and void.

The city is incompetent to grant the use of its streets to railways for depot purposes.

Article 454, Revised Civil Code.
Daublin vs. Mayor, 1 Martin, 187.
Xiques vs. Bujac, 7 An. 505.
Elliot on Roads and Streets, pp. 481-482.

The city undoubtedly owes and must return to complainants the amount received on account of rent for the strip of ground and batture in front of the Upper City Park. It is fair to presume that the city would have heretofore offered to do so had it been thought that a tender would have been accepted during the pendency of this litigation. The failure on the part of the city to make the tender would not, however, estop it from asserting the nullity of the lease even if acceptance of the so-called rent was specially pleaded as estoppel.

Ordinance No. 685, C. S. repealing the lease only recognized the nullity of that which the law made null.

In conclusion of this argument we feel in duty bound to say, though it may be rather beyond the record, that since the 29th of March, 1883, the date of the expiration of the term within which the New Orleans Pacific Railway Company was to locate its terminus within the area bounded by the New Canal, the Claiborne Canal and Carrollton avenue, and to construct a line of railroad from a point on the river front in the vicinity of the Upper City Park, along the western border of the park to its designated terminus, the city of New Orleans has greatly improved in the neighborhood of the park. Tulane University, with its handsome buildings, now stands on St. Charles avenue, opposite the entrance to the park, and in the immediate vicinity churches, schools and fine residences have been erected, expensive pavements have been laid, and other improvements made. The district has grown to be one of the most beautiful and valuable in the city of New Orleans.

While conditions have not changed as to the locality designated by Sec. 1 of Ordinance 6695, A. S., for the terminus, conditions have changed along the route by which the terminus was to be reached from the river front under Ordinance No. 6938, A. S.

To allow at this date the operation of a steam railway from the river front along the western border of the park, across St. Charles avenue to Claiborne street, after the failure of the New Orleans Pacific Railway to locate its terminus at the designated point, or to build a railway to that terminus within the time specified, and after its abandonment for so many years of any real intention so to do, would be both inequitable and calamitous.

We pray that the decree of the Circuit Court be reversed, annulled and set aside, and that complainant's suit be dismissed at their costs.

Respectfully submitted,

SAM'L L. GILMORE,
Solicitor for the City of New Orleans.

APPENDIX.

No. 12,151.

LOUISIANA CONSTRUCTION AND IMPROVEMENT COMPANY ET ALS. VS. THE ILLINOIS CENTRAL RAILROAD COMPANY ET ALS.

The Common Council of the City of New Orleans, possessing under its charter and other statutes of the State, only power of administration, has no authority to enact and promulgate an ordinance authorizing a railroad corporation to erect buildings and other permanent structures upon the batture in front of its riparian property on the bank of the Mississippi river, within the limits of the city, connect same with wharves on the edge of the water and consecrate same to its exclusive use and enjoyment for a period of ninety-nine years.

Such an ordinance confers a grant that is in the nature of a perpetuity, and not a license revocable at the will of the municipality.

Miller, J., concurring: Our courts have recognized the right of action of the citizens in controversies of this nature. Whenever batture is withdrawn, enough must be left for public use. This ordinance takes all, and practically for all time. Whether accretion in the future expands this batture, or the encroachment of the river diminishes the area, the ninety-nine years' ordinance is to stand an impediment, I think, to that control of public places, apt to become requisite, conferred on the Council for the public good, and with which I think the city can not part,

Breaux, J., dissenting: Under its delegated and implied powers the city has the right to pass an ordinance "to extend the commerce of the port, and to facilitate the export and import business" of corporations in the service of the public. The license being legal and authorized is not made necessarily void as between plaintiffs and defendants by the period of ninety-nine years for which it was granted.

The defendant common carriers are legally authorized to maintain a free wharf for vessels connected with their business, upon condition that improvements were to be made in the interest of commerce and industry. The use is public, and there was no invasion of the legal or equitable right of any one.

APPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

J. R. Beckwith for Plaintiffs, Appellants.

S. L. Gilmore, City Attorney, for City of New Orleans, Appellee.

Thomas J. Semmes and *Farrar, Leake & Lemle* for Defendants, Appellees:

ON APPLICATION FOR A REHEARING.

Plaintiffs, as citizens and taxpayers, are utterly without interest in the subject matter in this suit; there being no showing in the petition that the ordinance complained of increases, directly or indirectly, the burden of taxation. Code of Practice, Art. 15; Handy vs. New Orleans, 39 An. 107; Conery vs. Waterworks, 41 An. 921; Dillon on Municipal Corporations, Secs. 920, 922, and authorities there cited; Beach on Public Corporations, Sec. 631, and authorities there cited.

By the Civil Code the "use of the banks of navigable streams is public, etc. Nevertheless the ownership of the river banks belong to those who possess the adjacent lands." C. C., Art. 455. The highest authorities in the greatest cases that ever arose on this question have settled this for all time. Municipality No. 2 vs. Orleans Cotton Press, 18 La. 122; New Orleans vs. United States, 10 Pet. 662.

The general public servitude in this article described does not, however, exist for all purposes, but only for such as are incident to the nature and navigable character of the stream. Lyons vs. Hinckley, 12 An. 657; Railroad Co. vs. Winthrop, 5 An. 36; Duvergé vs. Salter, 6 An. 450.

A reading of Partidas, Title XXVII, laws 6, 7 and 8, will show that the above *dictum* as to the nature and character of the general public servitude in the banks of rivers is literally correct, even under the old Spanish laws. Moreau & Carleton's Partidas, Vol. 1, pp. 337, 338.

The legal presumption from the character of the structures authorized by the ordinance at bar, "wharves, docks, piers, elevators, warehouses," etc., must be that such structures will be facilities to commerce and navigation. Stevens vs. Walker, 15 An. 578; Atlee vs. Packet Co., 21 Wall. 393; Geiger vs. Filor, 8 Fla. 323.

As "individuals of full age, residing in the place," plaintiffs are equally without rights of action, under Art. 861 of the Civil Code of 1870, to prevent the construction, by riparian proprietors, of buildings and other works of public utility, for the mooring

of vessels and discharge of their cargoes," as authorized by the ordinance complained of, since the city of New Orleans has express delegated power to authorize such structures. Civil Code, Art. 863.

This power she has exercised in the fullest terms, over and over again for years.

The Code of Louisiana, of 1808, does not contain Art. 863 or any part of Title VI. This is an innovation. See amendments to the Civil Code.

The entire legislation of the State and the jurisprudence from the earliest times recognize the authority of the city of New Orleans to control and administer in the interest of commerce the public servitude along the banks of the Mississippi river within her limits, and there is no case in Louisiana jurisprudence denying the right of any municipal corporation to license the building of wharves and other works of public utility by riparian proprietors, when contested by one or more individual inhabitants.

In instances where the city of New Orleans appears to have delayed or refused to grant interstate railway companies the right to connect carrying facilities by land with shipping, the sovereign power in furtherance of its general policy of encouraging railroad enterprises has stepped in and acted directly. 27 An. 414; Act 78 of 1870.

The Dock Commission Act contains an express legislative recognition of the right of riparian proprietors to maintain, for their exclusive use, wharves established prior to the passage of the act, under whatever authority constructed. Act No. 70 of 1896, Sec. 2, p. 103.

The ordinance complained of is not an alienation nor a sale or lease of city property, which the city is restricted, in the mode of dealing with, by the terms of her charter, limiting a lease to ten years and requiring public competition. City Charter of 1882, Sec. 8; Act 135 of 1888; Construction Co. vs. City, 140 U. S.

The term ninety-nine years can have no determining effect on the validity of the ordinance. If no terms had been expressed in the ordinance it would have been perpetual or during the "term of the charter" of the licensee. Telephone Company vs. City,

40 An. 41; East Louisiana Railroad Company vs. City, 46 An.; Flynn's Digest of City Ordinances, p. 1208; Wharf Ordinance of Texas & Pacific Railway Company.

Whatever be the limit of time or term, if any, for which the city could authorize such structures, as provided in this ordinance, whether for ten or twenty-five years or more, no right of action could arise in respect to the ordinance upon that ground, until the legal period had expired.

Articles 46 and 56 of the Constitution manifestly have no application to this case.

Argued and submitted December 19, 1896.

Opinion handed down February 15, 1897.

Rehearing refused (reasons assigned) April 12, 1897.

The opinion of the court was delivered by

WATKINS, J. The plaintiffs allege that the Louisiana Construction and Improvement Company is the present lessee of a very large portion of the wharves on the banks of the Mississppi river in front of the city of New Orleans, for a term of years, with several years thereof yet to run.

That said lease was farmed out to said corporation at public auction; and that it acquired same for a large and valuable consideration, paid and to be paid to the city, over other bidders therefor.

That said corporation as lessee, as well as other taxpaying inhabitants of the city whom they personate, have an interest in asserting in a court of justice the patent illegality of a city ordinance, the enactment of which was an attempted exercise of a power which had not been granted to the municipality by the Legislature, and was *ultra vires* and void.

The petitioners then represent that the council of the city of New Orleans purported and attempted to enact Ordinance No. 11,765, Council Series, on the 15th of January, 1896, the purport and effect of which was to confer upon the defendants authority to erect upon the batture in front of their riparian property such permanent structures as warehouses, sheds, elevators, buildings, railroad tracks

switches, turnouts, sidings, etc., same to be of such character and capacity "*as the necessities* of (their) business may require;" and further authority to use and operate and maintain the same.

And the further effect and purport of said ordinance appears to be that, at the same time, the defendants may permit all vessels or other water crafts landing, with their permission, at the wharves which they may construct on the water's edge, or doing business with them, to receive and discharge all of their cargoes free of any wharf dues or charges of any kind whatever during the continuance of the term of their grant—said grant being of the duration of ninety-nine years, and having been conferred without public advertisement and adjudication, and without the payment of *any* price, present or prospective.

Upon this hypothesis the plaintiffs claim that the said ordinance is, in legal effect, a *grant in perpetuity of all the rights and uses of the batture and wharves* of a large segment of the Mississippi river, in front of the city, gratuitously, and that the effect of same upon the riparian property of the corporation would be to consecrate it in fee simple to the uses and purposes of the corporation irrevocably. In other words, that the City Council of New Orleans, possessing only the power of *administration* of the wharves and batture, has undertaken, by said ordinance, to confer upon the defendants the perpetual and exclusive use and enjoyment of a portion of them gratuitously; and that the ordinance is *ultra vires*, and, therefore, void. And, further, that the city is incapacitated to convey in this manner, or to surrender its police power to either corporation or individual, public or private.

The full text of the ordinance is as follows, viz.:

MAYORALTY OF NEW ORLEANS,
CITY HALL, January 15, 1896.

[No. 11,765, Council Series.]

"1. *Be it ordained by the Common Council of the City of New Orleans*, That in order to extend the commerce of the port and to facilitate the export and import business of the Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company, permission and authority be and are hereby granted to the said companies, their successors and assigns, to *occupy for their uses*

and purposes for the period of ninety-nine years from the date hereof, all that *part of the batture* lying between Toledano and General Taylor streets fronting the property owned by either of said companies in the Sixth Municipal District of the city of New Orleans.

"2. *Be it further ordained, etc.*, That the said Illinois Central Railroad Company and the Yazoo & Mississippi Valley Railroad Company, their successors and assigns, be and they are hereby authorized to construct, maintain and operate thereon such wharves, docks, piers, bulkheads, elevators, *warehouses, sheds, buildings and appurtenances as the necessities of their business may require;* all such wharves to be lighted, maintained and kept in repair by the said companies at their own expense.

"3. *Be it further ordained, etc.*, That the said railroad companies in the construction of such wharves shall be required to conform, as nearly as may be, to the standard of the specifications of the existing wharves for steamships between Thalia and Calliope streets.

"4. *Be it further ordained, etc.*, That all steamships, vessels and other water craft receiving or discharging cargo at said *wharves for either of the said railroad companies*, or any steamships, vessels or other water craft *using said wharves by and with the consent of said railroad companies, shall be exempt from payment of all wharf dues;* but this shall *not exempt steamships*, vessels or other water craft from wharf dues for receiving or discharging cargo at or occupying any other wharf.

" 5. *Be it further ordained, etc.*, That said railroad companies shall have the right to construct, maintain and operate, with steam locomotives, or other appropriate motive power, upon and along said wharves, and upon the property owned by said companies, between Tchoupitoulas street and the Mississippi river, from Toledano street to General Taylor street, with the right to cross all intervening streets, all such tracks, switches and turnouts as may be necessary to carry on the business of said companies, with the right to connect said tracks, switches and turnouts with existing tracks of the New Orleans Pacific Railroad Company on Water street, and with the wharves, docks, elevators and buildings that said companies may construct upon said batture and property owned as aforesaid; and said companies shall have the further right to construct,

maintain and operate a single track from Toledano and Water street along Water street to General Taylor street, with such switches, sidings and turnouts as may be necessary to connect said single tracks with said existing track and with the wharves, elevators and buildings aforesaid; all such tracks, switches, sidings and turnouts to be constructed on lines and levels to be approved by the City Engineer.

"6. *Be it further ordained, etc.*, That all the acts and doings of the said companies, under this ordinance, shall be subject to any ordinance or ordinances which may be hereafter passed by the City Council concerning the same.

"7. *Be it further ordained, etc.*, That this ordinance shall take effect from and after its passage.

"8. *Be it further ordained, etc.*, That work shall be commenced within ninety days from the promulgation of this ordinance.

"Adopted by the Council of the city of New Orleans, January 14, 1896.

"DAN A. ROSE, *Clerk of Council.*

"Approved, January 14, 1896.

"JOHN FITZPATRICK, *Mayor.*

"A true copy.

"CLARK STEEN, *Secretary to the Mayor.*"

And the following are the objections which are stated in the plaintiffs' petition, and the grounds of nullity upon which they claim to rely, viz.:

I.

"There is and was vested in the said city government no lawful authority to grant away from or dispose of any property, right or thing of value to the inhabitants of the city of New Orleans or the people of the State 'to any person, persons, association or corporation, public or private,' this being expressly prohibited by Art. 56 of the Constitution of the State and is *ultra vires.*

II.

"The supposed ordinance on its face unlawfully grants to the said Illinois Central Railroad Company and the said Yazoo & Mississippi Valley Railroad Company special and exclusive rights, privi-

leges, immunity and monopoly in the said described public batture, between General Taylor and Toledano streets, to the exclusion of the public, in violation of the State Constitution, particularly Art. 45, and the provisions of said Constitution, prohibiting monopolies.

III.

"The batture between General Taylor and Toledano streets, between the public levee and the river, is public property as *locus publicus*, under the laws of the State and Civil Code thereof, to the use 'of which all of the inhabitants of the city, and even strangers, are entitled in common,' and the City Council is without authority or power to destroy or change such public servitude, or repeal and cancel such public grant and consignment to general public use made by the State, and deliver over to private corporations the dominion and control thereof for their own private ends and purposes, as attempted in said supposed ordinance.

IV.

"Under the public law and jurisprudence of the State no person or corporation can acquire any right to construct or maintain any permanent building or structure on said batture, or to make any use thereof tending to impair or impede the right of the public to free access to said banks and batture as a *locus publicus*, or the free public use thereof for all of the purposes for which such public right and servitude on river banks and battures was established by law. Yet, said supposed ordinance, on its face, not only destroys said public right and servitude for the period of ninety-nine years by excluding the public therefrom without the permission of the supposed grantees, but allows its destruction as a *locus publicus* by the erection of such permanent private 'wharves, docks, piers, bulkheads, elevators, warehouses, sheds and appurtenances' as the supposed grantees may elect at their unrestricted pleasure, which, when erected, are to be private property, under their private control, with even no reservation of the right of entry by the public, either to the said structures when erected, as to the territory, in terms granted away by the said supposed ordinance.

V.

" It is beyond the legislative or granting authority of the government of the city of New Orleans to grant or convey away the right of the public in any *locus publicus* to any persons or corporations, either permanently or for any time or term of years.

VI.

" The Legislature of the State never intended to or did ever confer on the government of the city of New Orleans power or authority to make or adopt said ordinance, either in the charter of the city or any amendment thereof, or under any implication of the power necessary or legitimate to carry out any power actully conferred on said city for its government. Sec. 8 of the City Charter, approved June 23, 1882, as modified by Act No. 135 of the acts of 1888, only conferring on the city power to either construct wharves and improve the banks, landings, and increase the utility thereof for public commerce itself, or lease the same for a limited period 'to such persons as will bind themselves, with security, to construct and keep in good repair such wharves and landings, and construct and keep in repair sheds over the wharves, and light the same and pay the cost of policing the same, for such just and reasonable charges on vessels and merchandise, or either, for the use of the wharves or sheds, as may be fixed in advance by the Council, and with such specifications as may be required by them.' The limit of leased terms being ten years, and for strictly public use.

VII.

" If the city had power to destroy and cut off the right of the public in said *locus publicus* by any form of legislation, the supposed ordinance is void, because it purports, and on its face grants a term of occupancy of said batture and landings for a period of more than ten years, and without the free competition and adjudication by the Comptroller, after the advertisement and competition made imperative by Act 135 of the acts of 1888, and excludes public general commerce from the use of said *locus publicus*, either for entry, passage or mooring, or unloading of the vessels, without the consent of the supposed grantees named in the supposed ordinance is first

obtained, to the exclusion of all authority of the city, the harbor master or any authorities of the port, thereby attempting in said supposed ordinance to convert public rights, public ways and public servitudes into strictly private property and title for ninety-nine years, excluding the general public not only from said territory and public place, but from the benefit and use of all the permanent structures, railways and wharves that the grantees may construct or project into the river at their will.

VIII.

"That under the laws and settled jurisprudence of this State said supposed ordinance is null and void, because it is unreasonable and oppressive, and contrary to right and public policy."

To this petition the defendants tendered, amongst other things, an exception of no cause of action; and this exception having been sustained, and their suit dismissed, the plaintiffs have appealed.

The province of this court is to determine whether or not the averments of the petition, coupled with the terms and conditions of the ordinance, which for the purposes of the exception are to be considered as read into the petition, have stated a cause of action. As the record discloses that the judge *a quo* did not deal with the question of the right or interest of the plaintiffs to institute this suit, we shall assume that to be true, and restrict our views to the want of corporate power in the City Council to pass the ordinance.

The provisions of the statute of the State which granted a charter to the city of New Orleans, upon this subject, are as follows, viz.:

"SEC. 8. * * * (5) To prescribe and collect wharfage and levee dues and to erect sheds over the wharves and buildings, to protect merchandise and make such charges therefor as will pay for the construction, keeping in repair, lighting and policing of such sheds and no more.

"The Council may lease or farm out the wharves and landings in sections for a period *not exceeding ten years*, to such persons as will bind themselves with security to construct and keep in good repairs such wharves and landings, and construct and keep in repair sheds over the wharves, and light the same, and pay for the cost of policing the same, for such just and reasonable charges on vessels and merchandise, or either, for the use of the wharves and sheds, as may be

fixed in advance by the Council, and with such specifications as may be required by them." Act 20 of 1882.

But that act was amended in 1888 as follows, viz.:

"Act 135, Acts 1888: Sec. 3. *Be it further enacted, etc.*, That said Council shall have no power to make or renew any lease of the wharves and landings, or any lease or sale of city property, except after public advertisement and free competition, and adjudication by the Comptroller to the lowest or highest bidder, as the case may be, according as the specifications of said lease or sale may require."

This is all the authority the city possesses in the premises—"to erect sheds over the wharves and buildings to protect merchandise," and to "farm out the wharves and landings * * * to such persons as will bind themselves * * * to construct and keep in good repairs such wharves and landings; and construct and keep in repair sheds over the wharves"—not to exceed a term of ten years.

The City Attorney in his brief takes the position that the railroad company has the right "to construct wharves, or other artificial accommodations for commerce in front of its property, and can use the same until the city of New Orleans exercises her exclusive right of building wharves," etc. Brief, p. 1.

Citing: Ellerman vs. Morgan Railroad Co., 34 An. 698; Ellerman vs. McMains, 30 An. 190; City of New Orleans vs. Wilmot, 31 An. 65; City of New Orleans vs. Railroad Co., 27 An. 414; Ellerman vs. Railroad, 105 U. S. 166.

Further, that the city has no power to designate a particular portion of the landings for the use of a particular public carrier, and to allow the use of batture for the erection of sheds and other structures necessary for the shipment or temporary storage of merchandise.

Citing: Heirs of Leonard vs. Baton Rouge, 39 An. 284; City of New Orleans vs. Railroad, 27 An. 415; Stevens vs. Walker, 15 An. 577.

From the foregoing he makes the following deductions, viz.:

"The ordinance in question, in so far as it purports to grant to the Illinois Central Railroad Company the right to occupy for its uses and purposes, for the period of ninety-nine years, from January 15, 1896, all that part of the batture between Toledano and General

Taylor streets, fronting the property of said railroad, is not valid, *as a contract*, the city being without power to grant to any person, for any purpose, the right to use any particular portion of the river front *for a term of years;* but the ordinance is valid as *a license*, which the city has a legal right at any time to *revoke*, and which must stand until revoked by the city."

No doubt could be entertained of the legality of the ordinance, if it extended no further nor granted anything more than the argument of the City Attorney assumes; but he fails altogether to treat the real gist of the ordinance, which, in our opinion, is, the gratuitous permission by the city to the defendants to erect upon the batture in front of their riparian property *permanent structures*, such as warehouses, elevators and the like, and to maintain the same for their exclusive uses for a period of ninety-nine years, in connection with and in addition to the aforesaid wharves. His argument altogether ignores the provision of the act of 1888, which declares in positive and mandatory terms, "that the (City) Council shall have *no power to make* or renew any lease of *the wharves* and landings, *or any lease or sale of city property except after public advertisement and free competition*," *etc.*

The *license* spoken of is nothing more nor less than the lease or farming out of the wharves and landings, which is mentioned in the city charter above quoted, for there is no other license known to the charter of the city. This is recognized to be the case in the dissenting opinion, from which we quote the following, viz.:

"The power the city now has of passing an ordinance authorizing the *lease* of the wharves for ten years covers a similar power we think as to the term of the lease. The city having the right to let for a term of ten years, has the power to *issue a license* at least for that length of time."

Then follows this distinct statement, viz.:

"The limitation of time as to the grant would not be cause to oust the license if the municipality persists in granting the right of occupancy and of use. As to the effect upon the license of granting an additional period of occupancy and use, which may be *ultra vires*, we have found no authority directly bearing on the point," etc. But the opinion cites approvingly the three following causes, viz.: City vs. Telephone Company, 40 An. 41; Railroad vs. City, 46 An. 526; Dartmouth College Case, 4 Wheaton, 518.

In our view, that opinion treats the subject as though the city had the right accorded her by the charter *to lease or license the right of occupancy and use of the batture*, whereas the statute confers the power on the city to "lease or farm out the *wharves* and landings," and "construct and keep in repair the sheds over the *wharves*," alone.

It is elementary that the "*use* of the banks of navigable streams or rivers is *public*." R. C. C. 455. That the banks of the Mississippi river is a *locus publicus* in which the entire public have equal rights, irrespective of the ownership of the adjacent property, or the rights of the riparian proprietor of the soil. R. C. C. 509.

The Code declares:

"Servitudes imposed for the public or common utility relate to the space which is to be left for the public use by the adjacent proprietors, on the shores of navigable rivers, and for the making and repairing of levees, roads and other public or common works." *Id.* 665.

It further declares that "works which have been formerly built on public places, or in the beds of rivers or navigable streams, or on their banks, and which *obstruct, or embarrass the use of these places, rivers, streams, or their banks, may be destroyed at the expense of those who claim them*, at the instance of the corporation of the place, or any individual of full age residing in the place where they are situated." *Id.* 861. (Our italics.)

Giving to these provisions of the Code a just and reasonable interpretation, we think the conclusion is irresistible, that the ordinance in question runs counter to the law in attempting to give the defendants a right to erect permanent structures upon the batture which will *obstruct* and *embarrass* the free use of a public servitude, and to maintain the same in perpetuity.

This court has had frequent occasion to construe and enforce the foregoing provisions of law, and among numerous cases the following may be cited, viz.:

In Mayor vs. Magnon, 4 O. S. 2, the case was that of the defendant having erected a shed on the bank of the Mississippi river, between the levee and the river, in order to carry on some work for the Spanish government, and as a place for the deposit of timber, who had enclosed a great part of the bank of the river near it for a

shipyard; and Judge Martin, in delivering the opinion of the Court, said:

"It appears to this court that the spot which the defendant enclosed is really a part of the common or public land, which is *out of commerce*, incapable of being alienated, and must ever remain free to the inhabitants and strangers; that the defendant can have no right, claim or title thereto, except in common with the rest of the community."

The city authorities ordered these structures to be abated, as a nuisance, and the defendant enjoined them from so doing. The District Court dissolved the injunction, and this court affirmed the judgment.

In Trustees of Natchitoches vs. Cox, 3 N. S. 140, this court affirmed a judgment decreeing the removal of a house which had been erected on the bank of Red river within the limits of the city, on the ground that same was a nuisance, having been placed directly on the "bank of a navigable river, and that it interrupted that use of it which is common to all men. *Partida* 3, 28, 7: *Curia Philippica*, *lib.* 3, Cap. No. 16."

In Henderson vs. Mayor, 3 La. 563, the court affirmed a judgment directing the removal of wharves, sheds and steam saw-mills which had been erected by the front proprietors on the alluvion of the river in such manner as to "obstruct a free passage on its bank," on the ground that same constituted a public nuisance; and in the course of their opinion "in relation to the third point, in which it is asserted that the works constructed by the plaintiffs are not incumbrances on public or city property," the court said: "This may be true with regard to the ownership. But if the public or the inhabitants of the city have a right to the use of the places incumbered and the works thereon erected impede and interrupt this public use they may be considered as nuisances. The right of way reserved in the grants of land fronting on the Mississippi, which authorizes the proper authorities to lay out and cause public roads to be made on the banks of the river, does not destroy the right of alluvion vested by law in the riparian proprietors. Yet while such roads remain appropriated to public use no person, not even the proprietor of the adjacent soil * * * would be permitted to erect buildings or make any works thereon, having a tendency to impede passengers,

or in any manner interrupt the public use of the road. Such works would constitute a nuisance, and might lawfully be abated or destroyed by orders from the police authority of the place where they existed, or perhaps by any private individual."

The case of Shepherd vs. The Third Municipality, 6 R. 349, was that in relation to certain valuable saw-mills, and the court said:

"The street and the banks of the river are *loci publici*—out of commerce—and the municipal authorities are bound to see that the use of them by the public be not obstructed; but they *have no power to allow any erection thereon which may render their use incommodious. They may, indeed, temporarily tolerate works thereon, which they may deem not injurious to the rights of the public; but no permission of the council can prevent a subsequent* council from putting an end to such toleration." (Our italics.)

In Harrison vs. City Council of Lafayette, 18 La. 295, the plaintiff enjoined the city, and claimed that the city had no legal right to order the demolition and destruction of their houses, stores and buildings, which the evidence showed had been built of brick on the banks of the river, "*outside* of the front street or highway, and between it and the river," but this court reversed the judgment of the lower court sustaining plaintiff's demand and dissolved the injunction and dismissed the suit.

The case of Herbert vs. Bensen, 2 An. 779, was that of a warehouse which had been erected by the defendant on a portion of the quay in front of the plaintiff's house on Bayou Teche, with the consent of the City Council of the town of St. Martinsville, and which the plaintiff sought to have abated as a nuisance, and the court said:

"It is conceded by the defendant, in his application to the corporation, that the place upon which the warehouse was proposed to be and was subsequently built was a public place. It has been so often and so uniformly held by the former Supreme Court that the places within the limits of a corporation can not be appropriated to private use, and that individual corporators, as well as the officers of the corporation, have the right to prevent such appropriation and to sue for the demolition and removal of buildings erected on them by individuals, that the question can no longer be considered an open one. Art. 859 of the Louisiana Code, which provides that corporations of cities, towns and other places may construct on the public places, in the

beds of rivers and on their banks all buildings and other works which may be necessary for public utility, for the mooring of vessels and the discharge of their cargoes, *does not authorize the erection of buildings for private emolument.*" (Our italics.)

Carrollton Railroad Company vs. Winthrop, 5 An. 36, was a similar case.

In McKeen vs. Kurfust, 10 An. 523, it was held that a cotton shed built on the bank of the Mississippi river which prevented the public from depositing their goods upon the same at the usual stage of high water was an obstruction to the use of the banks by the public and removable summarily as a nuisance.

In Sweeny vs. Shakspeare, Mayor, 42 An. 614, the proof showed that the plaintiff had leased from the Texas & Pacific Railroad Company a portion of the batture in front of its riparian property on the Mississippi river, in front of the city of New Orleans, and had thereon established certain piles and clusters of piles, for the purpose of protecting certain hitching posts for the purpose of securing his barges and boats laden with coal, an article which he was engaged in selling to the public; and we held that he was "without right or authority to build houses on the batture, and rest their foundations upon piles driven in the ground. This was an evident appropriation *to his exclusive use of the river bank*, in direct violation of the right of control and administration which is vested in the city."

In Ruch vs. City, 43 An. 275, all of these principles were examined with care and affirmed.

But it is contended by defendant's counsel that a different doctrine was maintained in Watson vs. Turnbull, 34 An. 857, and one that favors the theory for which they contend.

In that case the court employed this language, viz.:

"Within its corporate limits, the city of New Orleans, under her charter and under the general law, has the right to control, manage and administer the use of the river banks for the public convenience and utility; to establish wharves and landings, to erect works, and provide facilities for the use of vessels and water crafts; and to charge just compensation therefor."

But that opinion just as emphatically announces, and we desire to emphasize the statement, that "riparian proprietors have no right to appropriate to their *exclusive use* these banks, and they

have *no private property in the use thereof, which is public.* (Our italics.)

This decision in no manner impeaches the authorities cited, and announces no contrary doctrine, in our conception.

But counsel particularly attract attention to that part of that opinion which reads as follows, viz.:

"The discretion of the city authorities in determining what are proper and needed facilities to commerce, and on what part of the river bank within her limits they should be established, is manifestly not a proper subject for judicial control or interference.

But we do not understand the "facilities to commerce" therein referred to to mean such permanent structures as elevators, warehouses and the like, for the exclusive and gratuitous use and occupancy of a single corporation for a period of ninety-nine years.

The question at issue in Watson vs. Turnbull was whether a riparian proprietor within the limits of the city of New Orleans could restrain the city by injunction from placing hitching posts along the river bank in front of their property, with the view of establishing a landing place, and furnishing facilities for the landing, fastening, etc., of coal boats and other water crafts, and the ground assigned for the injunction was that "there existed no necessity of commerce requiring the placing of these posts; that the plaintiff had already placed, at their own expense, all such posts as were required; * * * and that the said action (of the city) would obstruct the free use of the banks of the river, and cause deterioration in value to the property of complainants."

It is striking, that the question presented and decided in that case was altogether a different one from the one we have at the bar, and that the "facilities to commerce" there treated of are those exclusively relating to the landing and fastenings of coal boats and other water crafts, a matter of administration, pure and simple.

It was quite a similar case to that of Sweeny vs. Shakspeare, *supra;* and the contention of the plaintiff in that case (Watson vs. Turnbull) was exactly the opposite to that of defendants in this case.

Surely, that opinion is not authority for the proposition that the City Council has power to grant to a railroad company permission to take possession of *all* the batture in front of its riparian property for

the space of a half mile or more within the limits of the city; establish thereon permanent structures and build wharves and landing places for vessels, and *exclusively* use, operate and maintain the same for a period of ninety-nine years, without adjudication, competition or compensation.

The same question again arose in Pickles vs. Dry Dock Company, 38 An. 412, same being an action on the part of a lessee from the city of New Orleans of the Third District ferry across the Mississippi river, to compel the defendant to remove certain illegal obstructions it had placed upon the river bank interfering with the exercise of his franchise.

The contention of the defendant was, that it had "the right to locate their docks and drive piles in the bed of the river because it was a riparian proprietor of the soil in front of the dock, and that it had thus located its dock and driven the piles in pursuance of an ordinance of the police jury of the parish of Orleans," and in disposing of that contention the court said:

"Numerous decisions of this court, in perfect harmony with general jurisprudence on similar questions, have placed beyond the domain of possible discussion the doctrine, that a city vested with the powers enumerated in the charter of the city of New Orleans has the undoubted and necessary power to *regulate the use of the banks* of a water course on which it borders," etc., citing Watson vs. Turnbull, thus placing upon that case the interpretation that the question dealt with and determined was the power to *regulate the use of the banks of the Mississippi river* and nothing more.

And as if to emphasize that statement, the court said further:

"It is now well settled that the general right of the city (to regulate the use of the banks of any water course) *must be modified by municipal regulations when adopted in conformity with chartered authorities.*"

In Heirs of Leonard vs. Baton Rouge, 39 An. 275, plaintiffs sought, as owners of riparian property, to recover from the defendant a strip of batture in front of the city, under the provisions of Revised Statutes, Sec. 318, as not being needed for the public use; and the city defended partly upon the ground "that in the exercise of her corporate powers, and to provide a revenue, lessen the burden of taxation and to increase the facilities of trade in the article of

fuel, which is one of prime necessity, she permitted a landing for coal in front of Leonardtown, where boats and barges are moored; and that for the privilege she has charged an annual rent."

Upon an examination of the evidence we found that the coal-chute spoken of rested on trestles, and was used for the purpose of transferring coal from barges on the Mississippi river to the cars on the bank.

In the course of our opinion, we said:

"The defendant has not built, nor permitted to be constructed, upon the space in controversy any *permanent* structure. The city claims that she only permitted and allowed certain constructions and embankments to be made from the bed or sloping bank of the river, between high and low water mark, in the interest of the commercial prosperity of the town, and to meet the *actual wishes of the people.*"

And, in the opinion on rehearing, the court said further, that the land in question was "necessary for public purposes, and is used for purposes of a public character through the medium of private parties, who act under the city authority *only temporarily granted.* The uses are as a landing, wharf and storing place for coal for the purpose of facilitating the reception and distribution of fuel to the inhabitants at reasonable prices, which are regulated to a certain extent in the ordinance."

"The public character of such uses is not destroyed by the fact that they are temporarily farmed out to particular individuals. Cities exercise, without question, the right of designating particular portions of their wharves and landings for the use of certain lines of vessels, or for the reception of certain kinds of commodities; and the power here exercised is of that general character"—that is to say, the power of administration.

The principles announced in that decision are in strict accord with those of Watson vs. Turnbull and Pickles vs. Dry Dock, but they are diametrically opposite to the following contention of the defendant's counsel, viz.:

"So far as constructing elevators, buildings, sheds, railroad tracks, etc., on the batture is concerned, the plaintiffs leave out of sight entirely the fact that this ordinance is, upon its face, a mere *license to riparian proprietors to use* a portion of the batture which (they) own; that under the provisions of Art. 318 of the Revised

Statutes, adopted in 1853, *any* riparian proprietor within an incorporated city or town, even a private citizen, who owns batture, may compel the (municipality) by suit to set aside for his private uses so much of the batture as may not be needed for general public purposes."

In our view, counsel has altogether misapprehended the plain intendment and true import of that statute, as will be seen from our opinion in Heirs of Leonard vs. Baton Rouge, just adverted to.

It does not confer upon a riparian proprietor the right to *carve out* a segment of the river front, and appropriate it *exclusively to his own use;* but it, on the contrary, confers on him only the right to require the city to yield up a portion of the soil of s river bank, of a recently formed batture, when there is more than is needed for public use, leaving the possession and dominion of the remainder, which immediately fronts the river, undisturbed.

In our opinion, that is exactly what the terms of the ordinance purports, for those of the first section declare in plain and unmistakable language, as follows, viz.:

"Permission and authority are hereby granted to the said companies, their successors and assigns, to occupy for *their* uses and purposes for the period of ninety-nine years from the date hereof, *all that part of the batture* lying between Toledano and General Taylor streets, fronting the property owned by either of said companies," etc. (Our italics.)

The grant is further supplemented by those of the second section, which provide that the defendants as grantees are "authorized to construct, maintain and operate upon (said batture) such wharves, docks, piers, bulkheads, elevators, warehouses, sheds, buildings and appurtenances as *the necessities of their business may require,*" etc.; that is to say, such permanent and enduring structures as may be required to effectuate the aforesaid right of permanent use and occupancy of said batture.

And still further to supplement the aforesaid grant, it is provided by Sec. 4 "that all steamships, vessels and other water craft, receiving or discharging cargo at said wharves *for either of said railroad companies*, or any steamboat, ship, vessel or other water craft using said wharves *by and with the consent of said companies shall be exempt from the payment of all wharf dues,*" etc., thus discriminating against

all steamboats, ships, vessels or other water craft *not* receiving, or discharging cargoes for either of said corporations, or with their consent; and giving to said corporations the exclusive use of such wharves, docks, piers, bulkheads, elevators, etc., as they shall establish on said batture.

And to point and fortify the foregoing terms of the aforesaid grant, the concluding portion of said section declares that same shall not have the effect of "exempting steamships, vessels and other water craft from wharf dues for receiving and discharging cargoes at or occupying any *other* wharf"—the purport of that clause being that any vessel, of any description, trading or dealing with the defendants, or with their consent, at said wharves and landing shall be exempt from the payment of wharf dues to the city or to the defendants, and that all other vessels of any and every kind and description, doing business at *other* wharves and landings of the city should not be exempt therefrom.

It does not require argument to prove that this ordinance yields up to the two defendants for a period of ninety-nine years, not only the *exclusive use and occupancy of all batture in front of their properties* on the Mississippi river between Toledano and General Taylor streets, but also the *exclusive control* of the wharves, docks, piers, bulkheads, elevators and appurtenances thereon for a like period of ninety-nine years.

Manifestly, if this ordinance be maintained there would remain to the city no right of supervision or use of either batture of this particular segment of the city or the wharves or their enjoyment. Her control over them in the interest of or for the benefit of the public would be entirely lost for a period of ninety-nine years—that is to say, in perpetuity.

The question propounded by this suit is whether the city can lawfully thus give away the use of all the batture and the control of the wharves and surrender the right to collect wharf dues of all vessels dealing at the wharves and landings of the defendants, while collecting from those doing business at all other wharves and landings.

If this ordinance is beyond the power of judicial revocation and annulment, the defendants will no doubt, during the limited period of ten years, have erected upon the batture spacious, expensive and permanent buildings and structures, such as elevators, warehouses,

docks, piers, etc., and will have established thereon connections between them and their wharves and landings. They will have constructed railroad tracks along the whole length thereof, crossing all intervening streets, and accompanied with sidings, switches and turnouts, such as are usual, convenient and necessary for terminal facilities of two great transcontinental systems, which the defendants represent.

There is, in our conception, no authority for the proposition, either in the ordinance or the law.

The Civil Code provides that "the corporations of cities and towns and other places may construct on the public places, in the beds of rivers and on their banks, all buildings and other works *which may be necessary for public utility*, for the mooring of vessels and the discharge of their cargoes, within the extent of their limits" (Art. 863); but this provision of law does not authorize the city to build permanent structures on the batture or banks of navigable rivers for the exclusive enjoyment and use of private individuals or corporations, or to grant them permission to do so.

But there are some authorities which have been cited and relied upon as supporting the theory contended for by the defendants, and which should not pass unnoticed.

One of these cases is Ellerman vs. Morgan's Railroad and Steamship Company, 34 An. 698; but that decision, in our view, presents an altogether different question.

The plaintiff, Ellerman, like the Construction and Improvement Company in this suit, was the farmer or lessee of the public wharves of the city and sought to compel the defendant to pay wharfage; and the latter resisted, upon the ground, amongst others, that "the right to build and use wharves was conceded to them and to their vendees by the *State* of Louisiana, and that the concession was a consideration or inducement for the building of the railroad, and constitutes a contract, the obligation of which can not be impaired." And the opinion shows that under a city ordinance then existing, the right of the wharf lessee to collect wharf charges was restricted to the wharves and piers which were "furnished by the city;" and that, as the wharves in question had been built by the defendant nothing was due the plaintiff. Citing Cannon vs. New Orleans, 20 Wallace, 577; New Orleans vs. Wilmot, 31 An. 55.

But aside from the proposition, the railroad company based its exemption from the control of the city on a contract made with the State as a sovereign, in whom the police power is vested, primarily. The city was without power to make such a contract.

And in Cannon vs. New Orleans the court said:

"It is a doctrine too well settled, and a practice too common, and too essential to the interests of commerce and navigation to admit of a doubt, that for the use of such structures"—the wharves—"erected by individual enterprise, and recognized everywhere as private property, a reasonable compensation can be exacted. And it may be safely added, also, that it is within the power of the *State* to regulate this compensation, so as to prevent extortion, a power often very properly delegated to the local municipality."

The principle announced in that case is very well illustrated in Railroad Company vs. Ellerman, 105 U. S. 166, which reviews the opinion of our predecessors in New Orleans vs. New Orleans, Mobile & Chattanooga Railroad Company, 27 An. 414, involving the same subject matter as the Ellerman case. *Vide supra.*

That decision may be fairly summarized as follows:

The railroad company having secured the passage of an act of the Legislature in 1869, granting it the right "to enclose and occupy for its purposes and uses" a portion of the batture on the river in front of the city of New Orleans, erected upon same wharves for the use of vessels and maintained same at its own expense.

Claiming as lessee of the city under a contract of 1875, the plaintiff enjoined the railroad company from the further use of the batture, levee and wharves as proposed, alleging that it had their *exclusive administration.*

In stating the claim of the wharf lessee, and what the decision of the court in 27 An. 414 was, the Supreme Court said:

"What that decision did affirm, however, was that the disposal of the public right on the premises, as a wharf, was in the *State*, to the exclusion of the city, so that if the joint resolution (of the Legislature) had been a cession to a natural person as riparian proprietor, to improve the premises as a landing place for water craft and for loading and unloading cargoes by building levees and wharves at his own expense, with the right to charge reasonable wharfage for their use, it would have been conclusive upon the city and those claiming

in its right. And construing the grant to the company as limiting the use of the property as a wharf to purposes strictly incident to its corporate business, still, in order that it should be beneficial to that extent, it would be essential that the company should have the right to exclude all other uses, and this would effectually withdraw it from the jurisdiction of the city authority over the general subject of the public wharves.

"Neither would this be in derogation of any vested right of the city. Whatever the power the municipal body rightfully enjoys over the subject is derived from the Legislature. They are merely administrative and may be revoked at any time, not touching, of course, any property of the city actually required in the course of administration."

The judgment of the court rejected the demand of Ellerman, and maintained the *exclusive* right of the railroad company to use the wharves and landings, which it had constructed upon batture in front of its riparian property; but the opinion is rested entirely upon *a grant by the Legislature* to the company, prior in date to that of the lease of the plaintiff from the city—holding that this legislative grant effectually withdrew the use of the wharves and the right of the city to administer them "from the jurisdiction of the city over the general subject of the public wharves."

The opinion further affirms that "whatever power the city enjoys over the subject is derived from the State, and that they are purely administrative and revocable at the will of the City Council."

But the court was guarded in making that statement, and coupled therewith the declaration that the revocation of any administrative function which the municipal authorities had granted to a private individual or corporation, such as the use of the wharves, "would, of course, not touch any *property* of the city actually acquired in the course of administration."

And, by analogy, the city would, in case of revocation of a grant, be under equal obligation to save the property of the grantee.

Applying the principle announced in that case to the one at bar, it is evident that this court can not affirm the legality of the ordinance under consideration, as it is founded upon neither a legislative grant nor legislative authority; and because the city has, under its charter, only a power of administration of the batture for the public.

But it must be observed that the Legislature did not grant to the railroad company, in the case cited, any such right or privilege as this ordinance proposes without the sanction of legislative authority.

Attention has been attracted to the opinion of this court in City vs. Telephone and Telegraph Company, 40 An. 41; but we do not think it is applicable.

It involves no question of servitude upon a riparian estate or batture, or wharfage; but the permission of the city, granted "to the defendant to construct and maintain telephone lines on its streets."

But the city ordinance was authorized by a special enabling act of the Legislature. Act No. 124 of 1880.

The provisions of that act were not only consulted by the court in the preparation of their opinion, but they were incorporated in it.

Also, to the case of Stephens vs. Walker, 15 An. 577.

The wharf and warehouse under consideration in that case were erected upon the banks of the Bayou Teche, in front of a public square, with the sanction of the council of the town of Franklin; but these constructions were authorized by a special act of the Legislature of 1857; and the plaintiff found it a necessity of the case to urge the unconstitutionality of the statute.

Of that question the court said:

"If the effect of the legislation was to defeat the rights of the public by a transfer of the public property to the exclusive use and control of private individuals, the position assumed by the plaintiff would not be without force.

"But the statute is susceptible of a different construction, and does not, in our opinion, confer such unlimited powers upon the municipal authorities. The erection of the wharves and buildings, instead of being detrimental, must necessarily be subservient to commerce; *otherwise the privilege is abused*, and the courts will grant the public adequate remedy." (Our italics.)

Likewise to the opinion of the Supreme Court in the Trustees of Dartmouth College vs. Woodward, 4 Wheaton, 518.

In that case it was ascertained and held that the British crown had granted a charter to the college in 1769, prior to the establishment of the government of the United States, which the revolution did not dissolve, and that the subsequent statute of the State of New Hampshire altering same without the consent of the corporation was

an attempted impairment of a contract which was protected by the United States Constitution.

And finally, to the decision in New Orleans vs. Louisiana Construction Company, 140 U. S. 654. In that suit was involved the question whether the city had so changed the character and destination of a portion of the batture in front of four of its public squares as to render same liable to seizure under execution—the contention on the part of the plaintiffs in that case being that the city had made a *locus publicus* private property through the instrumentality of an ordinance which provided for the shelter and protection of the sugar and molasses received at the port of New Orleans, the terms of which granted defendants the exclusive right to this use for the term of twenty-five years.

The court held that the grant did not have that effect.

But the ordinance provided that the contemplated sheds should not approach within one hundred and fifty feet of the wharves in front of the sugar landing; and it specifically provided that, at the end of twenty-five years, the city was to have the option of terminating the lease and taking the sheds at half their appraised value, of extending the same for a further period of fifteen years, at the end of which they were to revert to the city.

Upon a careful study of these cases we have been unable to discover in them anything contrary to the opinions of this court we have collated above.

But the contention of plaintiff's counsel goes further. It directs our attention to certain provisions of the Constitution, which he argues, and with force and plausibility, render it very doubtful whether the Legislature *could*, constitutionally, exercise the authority of enacting a law enabling the city to pass and promulgate such an ordinance as the one under review.

Among the number we may cite the following, viz.:

"The General Assembly shall have no power to grant, or to authorize any parish or municipal authority to grant any extra compensation, fee or allowance to a public officer, agent, servant or contractor; nor pay, nor authorize the payment of, any claim against the State, or any parish or municipality of the State, under any agreement or contract made without express authority of law; and

all such unauthorized agreements or contracts shall be null and void." Const., Art. 45.

"The General Assembly shall not pass any local or special law on the following subjects, viz.:

* * * * * * *

"Granting to any corporation, association or any individual any special or exclusive right, privilege or immunity." *Id.* 46.

"The General Assembly shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual to the State, or to any parish or municipal corporation therein." *Id.* 57.

"The exercise of the police power shall never be abridged, nor so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well being of the State." *Id.* 235.

"And, finally, the Constitution provides that no monopoly or exclusive privilege shall *exist* in this State," etc. *Id.* 248. (Our italics.)

A mere casual glance at the foregoing constitutional provisions suggest a manifest incompatibility between them and a legislative act of the purport of city ordinance 11,765.

In any light in which that ordinance can be viewed, in our opinion, it seems to be utterly illegal and *ultra vires*, and can found no right in, and secure no privilege to, the defendants.

Entertaining this view, we are of opinion that plaintiffs' petition states a cause of action, and that the judgment appealed from should be reversed, and the cause be remanded for a trial upon its merits.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the cause be remanded to the lower court to be therein proceeded with according to law and the views herein expressed.

And it is finally ordered and decreed that the costs of appeal be taxed against the defendants and appellees, and those of the lower court await final judgment thereon.

NICHOLLS, C. J. I concur in the decree.

CONCURRING OPINION.

MILLER, J. This case is here only on an exception of no cause of action. It is a suit by citizens and taxpayers assailing, as an illegal encroachment of the public right, an ordinance of the council disposing of the batture. If, in any respect, the case discloses a cause of action the case must go back. Our courts have recognized the right of action of the citizen in controversies of this nature, but, if we are to deal with the important questions discussed at the bar, it will be far better to have an appeal on the merits.

The ordinance proposed to grant to the railroad company all the batture between General Taylor and Constantinople streets, in front of the property owned by the companies, of which frontage we have no knowledge, for the period of ninety-nine years, to build wharves, buildings, warehouses and appurtenances for the uses of the companies.

A long line of decisions has affirmed that the municipal authorities have, in respect to that space defined as between the front row of houses or property line, or Front street to the river, only the administrative function, and no power of alienation. In the charter, the measure of all power the city can exert, it is difficult to find the authority for this ordinance, dealing with this batture.

It is said the ordinance proposed no alienation. If by this is meant that the ninety-nine-year feature distinguishes it from a conveyance, it seems to me the difference is one of phraseology. That public uses are defined in the Code needs no discussion. The ordinance gives all the rights of occupancy and enjoyment for the uses of these companies that ownership can convey.

Our law makes liberal provision for the withdrawal, on the demand of the riparian owner, of such part of the batture on his front as may have become unnecessary for the public use. If the city itself is the front proprietor, it can exact the same right of withdrawal conferred on all riparian owners. This provision, it seems to me, would afford the companies the method entirely within the law of utilizing the front property and batture the ordinance states they own. Whenever batture is withdrawn enough must be left for public use. This ordinance takes all, and practically for all time. Whether accretion in the future expands this batture, or the encroachment of the river diminishes the area, the ninety-nine-year ordinance is to stand an

impediment, I think, to that control of public places, apt to become requisite, conferred on the council for the public good, and with which, I think, the city can not part.

A few years since we witnessed the sale under execution as private property, of part of the public levee on which the city had authorized the erection of sheds to shelter products landed on the levee. The Supreme Court of the United States annulled the sale, announcing in its opinion that which is not at all novel to us here, that the council clothed only with the power of administration had no power of alienation of the public levee, nor had it by that ordinance undertaken to do so. The principle of that decision is pertinent in this discussion.

With the limitations given full force, on the power of the council with respect to batture, the line of my investigation has left no doubt on my mind of the competency of the council to give to railroads or other corporations connected with our commerce, privileges to build and maintain wharves, elevators, docks or other constructions on the batture or extending into the river, of a character to serve the uses of commerce. Such privileges have been of constant recognition. It is not within the province of our opinion only on the exception to say more as to such privileges, their scope or as to the supervision they imply of the city authorities. I have endeavored to say briefly what the discussion here seems to invite, and thus indicate my view in general propositions as to this ordinance.

I concur in the decree which simply remands the case for trial on the merits.

Dissenting Opinion.

Breaux, J. The Louisiana Construction and Improvement Company, one of the appellants, claims to have a *locus standi* in court for the reason (it alleged) that it has complied with its contract as farmer of the revenues of the public wharves; that performance on its part involved the necessity of making large improvements and annually expending large amounts; that one of the covenants of the contract required the wharfage should not be charged at any of the wharves and landings improved for or by the city, and that, in consequence, the grant herein involved is illegal. In addition to this special ground the appellant company and three other taxpayers

represented that the city of New Orleans unlawfully attempted to grant to the Illinois Central Railroad Company and to the Yazoo & Mississippi Valley Railroad Company for the period of ninety-nine years the public batture on the banks of the Mississippi river, between Toledano and General Taylor streets, fronting property owned by the defendant companies between these streets.

The preamble of the ordinance assailed, sets forth the purpose to extend the commerce of the port and facilitate the business of the defendants, and to that end the body of the ordinance grants permission and authority to the defendant railroad companies, to occupy for their use and purposes, the batture, for the period alleged by the plaintiffs; they (the defendants, common carriers) are also authorized to construct thereon wharves, docks, piers, bulkheads, elevators, warehouses, sheds, buildings and appurtenances at their expense, and they are required to conform, as nearly as possible, to a stated standard in the construction of the wharves; the other improvements, by the terms of the ordinance, include steam locomotives and other motive power. These are to be located upon the wharves and along wharves on the river front between the streets before named, with the further right of crossing intervening streets and of connecting the tracks, switches and turnouts with the track of the New Orleans Pacific Railroad Company, on Water street, and with the wharves, docks, elevators and buildings that the defendant company may construct upon the batture and upon their property; they are also authorized to operate a single track, with necessary switches, sidings and turnouts from certain points designated in the ordinance.

The ordinance exempts steamships and other water craft receiving or discharging cargo at these wharves for either of the defendant companies, or with their consent, from the payment of wharfage dues. In other words, in the language of Sec. 4 of the ordinance, all water craft "receiving or discharging cargo at said wharves for either of said railroad companies, or any steamships, vessels or other water craft using said wharves by and with the consent of said railroad companies, shall be exempt from payment of all wharf dues; but this shall not exempt steamships, vessels or other water craft from wharf dues for receiving or discharging cargo at or occupying any other wharf."

The defendants pleaded several grounds of exception and the

exception of no cause of action in the alternative, which was sustained by the District Court.

I pass without comment, as it would serve no purpose in support of my conclusion, all the grounds pleaded, save those included in the plea of no cause of action.

THE SPECIAL INJURY AVERRED BY ONE OF THE PLAINTIFFS.

First, it is insisted that the Louisiana Construction and Improvement Company, in its individual capacity, is exposed to personal injury, which, it alleged, it sought to avert by intervening in this suit and by joining the other plaintiffs who are resident citizen taxpayers of the city of New Orleans.

This intervening company is lessee of the public wharves and landings of the city from Toledano to Piety streets (a distance on the river front not included in the license to the defendant railroad companies) for the term of ten years from the date of the lease.

It alleges substantially that the wharf charges agreed upon between it and the city embraced a rate of charges for all wharves; those to be charged by it and those to be charged by the city, outside of the limits of the territory included in the lease.

It also alleged that it agreed to these conditions, and subsequently expended large amounts in the construction of wharves and other improvements of the public landings, thinking (it averred) that the wharfage dues (if charged) would reimburse it for the large expenditures made.

It urged that the city has violated its contract by gratuitously allowing to the defendants a portion of the public landings above the territorial limits of its own grant.

It appears to me that the right granted to the Louisiana Construction and Improvement Company was confined by the words of the act granting the right to the shores designated in the lease, but, conceding for the moment that the letter of the act is as extensive as it is claimed by this company, the interpretation is impossible that would entitle the farmer of the revenues to control the rate of wharfage of wharves not within the territorial limits covered by the lease.

The city was without the power to make such an agreement Railroad vs. Ellerman, 105 U. S. 166–174.

But I have conceded more than the act of lease grants to the

Louisiana Construction and Improvement Company. After a careful reading of the many sections of the act, I am convinced that it was not the intention of the city to transfer to this company the right to control the rate of charges at other wharves than those expressly leased. There is no express stipulation in the contract of lease regarding the city front not leased; without such a stipulation it would be difficult to conclude that the unleased portion was subjected to the same charges for wharfage without regard to the will of the municipality. In my view, the lessees did not acquire the right to control the rate of charges on the river front not leased to them.

THE CITY HAS NOT ALIENATED A PUBLIC RIGHT.

The next proposition relied upon by the appellant is, that the city of New Orleans was without power to destroy or change a public servitude and deliver a portion of the shores to the dominion and control of private corporations.

In view of the facts I do not think this proposition can be sustained.

The city has granted a license to a corporation to use a portion of the banks of the river. It does not hold from the city a right at all, translative of property. The dominion is not illegally affected by the ordinance assailed. The property remains the property of the riparian owners subordinate to the servitudes imposed for public utility.

WITHIN CONSTITUTIONAL LIMITATIONS.

Another objection urged by the plaintiff against the ordinance assailed is, that it was contrary to Arts. 45 and 56 of the Constitution prohibiting the public authorities to "loan, pledge or grant" any property of the State or city to any person or corporation, public or private.

The word "grant," as employed in the article of the Constitution, does not include a mere "permit" or "license." They are public works.

In lieu of wharfage dues the city elected to accept additional facilities to commerce on the line indicated.

I do not think that the license has anything about it of the gratuitous, and that is the "grant" which the Constitution prohib-

its; the purpose was the improvement of the port and additional facilities to public commerce.

POWERS DELEGATED TO THE CITY.

Another objection of the plaintiff is, as I interpret, that no authority was given to the city, in any case, and for any purpose, to grant a license as here granted, and that it was never intended to grant or to let any public battures or river bank for any purpose for a period longer than ten years, nor to authorize any one to impair or destroy the right of government of the general public.

May it not be said in answer to plaintiffs' last clause of the objection, that the city has not impaired the rights vested in third persons, or destroyed any common right, by authorizing repairs at a designated point on expressed conditions. The ordinance has only modified the use. The improvements permitted are public.

Reverting to the alleged want of delegated power in the Council urged in the first division of the objections I am considering, it must be taken for granted that no one will assert that the city did not have control and management of the wharves, landings and quays.

Under this grant of power the corporation may adopt such means as are required in the interest of proper control and good management. Was it not within the power granted of legitimate control and management?

In Schwartz vs. Flatboats, 14 An. 240, 244, I find an affirmative answer. The farming of markets, port dues, and other similar acts, said the court, are acts of administration. The public is the great usufructuary; the corporation is the administrator, and as such has the power to "license" and "permit" the use as was proposed by the ordinance assailed.

In addition to the delegated power of administration, there are special powers delegated.

The council may farm out the wharves. Why should not this power cover or include the secondary right of granting a license?

Quod minimum sequendum est.

Again: the city unquestionably had the power to refuse to riparian owners the right to erect wharves.

Upon this point it has been decided that a power to refuse to riparian owners the right to construct wharves included the additional power to grant the right. City of Baltimore vs. White, 2 Gill. 459.

It has even been treated or considered as one of the implied powers of a corporation.

"In the earliest times of the colony before the passage of any ordinance upon the subject wharves were built by the proprietors of land bounding on the sea by permission of authority of the towns." Gray's Reports, Vol. 3, p. 514.

Lastly on this point: "The corporation had the exclusive right to determine when and to what extent the riparian proprietors might take possession of the batture." Remy vs. Municipality, 12 An. 500.

LIMIT OF LICENSE AND WANT OF ADVERTISEMENT.

Other grounds relied upon by plaintiffs are that the limit of the license, ninety years, and the failure to advertise the grant for sale and invite competitive bidders, affected the grant with nullity.

The riparian ownership of the shores of waters is of great antiquity and from the earliest period in the history of civil law that ownership has carried with it rights and privileges not enjoyed by third persons.

In the Institutes of Justinian it is announced with oracular brevity:

Præterea quod per aluvionum agro flumen adjecit jure gentium nobis acquiritur—i. e., whatever the river has added to your lands becomes yours.

The principle governs in matter of the banks of the river here, as it applied to the borders of the Tiber under the reign of Augustus.

But the right of the owner is subordinate to a servitude, imposed for public or common utility. C. C. 665.

In our view, however, the municipal authorities may grant to him a right or privilege on the river banks immediately in front of his lands, that they might properly deny to one who is not the owner of the adjacent lands, provided always so as not to work an injury to the public.

"The right of the General Assembly to grant the right to corporations or individuals to make and maintain wharves has been long settled." Railroad Co. vs. Ellerman, 105 U. S. 166-174, citing, ap-

provingly, 5 An. 661; 15 *Id.* 577; 22 An. 545; 6 N. Y. 523; 26 *Id.* 287.

In the first cited case, it is true, the State was the grantor of the right to maintain wharves to the riparian owner.

In this case the right of maintaining wharves and of controlling the public battures by legislative grant was in the city. The city is authorized to maintain wharves and control the batture.

With reference to the term of the license, if it be an issue here, I have already stated, the power the city now has of passing an ordinance anthorizing the lease of the wharves covers a similar power as to a license. The city having the right to let for ten years, has the power to issue a license at least for that length of time.

The result is that the plaintiffs show no cause of action during the ten years from the date of the license. The cause will arise if at all after that period.

For the purpose of illustrating: A riparian owner authorized by the municipality to build a wharf, or to construct other improvements beneficial to navigation in front of his property, stipulates that it shall remain under his management, subject of course to municipal supervision, for a stated number of years.

Let us assume that, as to term, the municipality has exceeded its powers. A number of taxpayers sue to have the constructed works removed as a nuisance and the occupant ousted.

Those suing, in so far as relates to nuisance, would find no support in Stevens vs. Walker, 15 An. 577, in which "nuisance," in a similar case was discussed and a principle in connection therewith announced. The limitation of time as to the grant would not be cause to oust the license if the municipality persists in granting the right of occupancy and of use.

But time is not an issue. We have noticed it only because it was earnestly argued for plaintiffs. Term is not of the essence or of the nature of a license. It is an incidental stipulation. C. C. 1764.

The question regarding the term has been passed upon by this court adversely to the position of plaintiffs in this case. City vs. Telephone and Telegraph Company, 40 An. 41-47.

The court declared that the grant was perpetual. This case was approvingly referred to by this court in Railroad vs. City, 46 An. 526 and 529, citing also the leading Dartmouth College case, 4 Wharton, 518.

The first cited decision *supra* and the opinion subsequently affirming it are more than ample to sustain my own position, more limited in its scope and effect.

In conclusion, on this point, it does seem to me that under its powers of administration, and its other "special" powers, to which I before referred, a large commercial city watered by a noble river, near the sea, has the authority to permit the riparian proprietor, for a limited time, to take possession of the batture and wharves for public use.

As relates to the want of advertisement and alleged failure to offer the privilege for sale by auction, the law invoked applies to the leasing or selling of the wharves and landings.

It is different in matter of this license. The city has not parted with its right to govern and to see that the license is complied with in every particular in the interest of the public.

There is here no lease or alienation of any kind, requiring a sale, under charter provision.

LIMIT OF POWER.

I do not agree with the statement or share in the apprehension gravely and forcibly expressed at the bar, substantially; if the ordinance now under consideration is legal, the river front on both shores of the river, within corporate limits of the city, may be disposed of without possible restraint of any kind.

Every ordinance must be reasonable and not inconsistent with the laws and public policy. The reverse of the proposition does not admit of argument. The license granted, we think, was both reasonable and consonant with public policy. It granted a privilege in which each, the city and the licensees, have an interest. The one in advancing the importance of its port; the other in increasing the volume of their business. Any ordinance, unreasonable and not in the public interest, as relates to public servitude, is not beyond the reach of judicial authority; such an ordinance, for instance, as would dispose of "both shores of the river without possible restraint of any kind."

This brings us to the question of an alleged franchise, which will, it is urged, destroy all other wharves or compel their maintenance by direct taxation. The argument at this point in the case is

directed against Sec. 4 of the ordinance copied in our opinion. The argument at the bar was chiefly directed against the "consent" feature of the section by which the companies are authorized to permit other vessels than those receiving or discharging cargoes for them, to use their wharves.

This additional authority may have been intended only as a complement of the license, to enable the licensees to more freely exercise the right granted. In any view there is not an actual issue before us for determination. It will be time enough to decide this issue, suggested in argument, when an actual case will be presented. It may never arise.

The objection, even if well taken, is inapplicable to the remaining portions of the sections.

If, in litigation, hereafter, it be decided that the "consent" feature is illegal and void, the other portions of the section would not thereby be affected.

"It is true that a portion of an ordinance may be objectionable and the other portions may be good, and in such cases that which is good remains." State vs. Mahner, 43 An. 496, 500.

The ordinance as a whole was attacked. I have considered it in its entirety. If in the exercise of the right granted, the licensees, in minor details, should attempt to exercise rights, illegally to the prejudice of other portions of the servitude on the river banks, it will be time enough to pass upon the actual case.

The following may, in a degree, illustrate and serve to suggest additional answer to the many questions raised in opposition to the ordinance.

Let us for a moment consider a new site. Imagine a new city lying on both sides of a navigable stream, guarded and protected on each side by a wall, with gateways at the foot of each street; with steps and inclines leading down to the river; with twenty-five gates on each side of the stream for ingress and egress, in imitation of the capital of the Orient on the Euphrates in the rich valley of that river of old. At all the gates save one dues are charged. At the gate excepted highly valued commodities, in which the public have an interest, are admitted free of all charges.

It would not be in the power of a few of the inhabitants of the city to cause the gate to be closed. To charge at one gate, all the gates

being free, would be an illegal discrimination against the public; but to exempt one gate, though dues are collected at all the other gates, is not a discrimination against the public, but in favor of the public.

In the same way and for similar reason, if all the wharves were exempt from dues it would be unlawful discrimination to permit the defendant companies to charge at the wharf of which they have the use; but it is not unlawful, in my view, in a port where charges are generally collected to except a limited front for a purpose deemed useful and public by the municipality.

The following is a summary of the points from my view of the issues:

The defendant common carriers were legally authorized to maintain a free wharf for vessels connected with their business upon condition that improvements were to be made in the interest of commerce and industry. The use is public, and there was no invasion of any legal or equitable right of any one.

The right of the city as regards the borders of the Mississippi river is a right of regulation and management, broader than exists in case an individual is authorized to regulate and manage. It does not cover the right of alienation, but the city has not sold or leased the batture.

The funds, credit, property, or things of value of the State, have not been loaned, pledged or granted by the grant of a license to riparian owners, to modify the public use of the batture and wharves.

Under its delegated and applied powers the city has the right to pass an ordinance "to extend the powers of the port and to facilitate the export and import business" of corporations in the service of the public.

The license being legal and authorized is not made necessarily void as between plaintiffs and defendants by the period of ninety-nine years for which it was granted. The licenser does not object; on the contrary, insists that it is legal.

As to the necessity, under the law, of advertising and inviting bidders, that applies to the alienation or lease of property, not to a license with a grant of use to the riparian owner.

A license to common carriers for public use, at a particular point,

would not warrant the issuing of other licenses without regard to reason and the necessities of commerce.

McENERY, J., concurs with BREAUX, J.

ON APPLICATION FOR REHEARING.

WATKINS, J. The District Judge maintained a plea of no cause of action and dismissed the plaintiffs' suit, and they having appealed we reversed his decree—a majority of the justices entertaining the opinion that the petition disclosed a cause of action.

The result of our decision is that the cause will be reinstated and remanded for trial according to law; and in the lower court it will have the same *status* that it had before this appeal was taken—the plea of no cause of action being omitted.

We have decided no issue *in* the case. Those issues made, as well as those which may be hereafter raised therein, will be considered and determined by the District Judge; as they will be completely at large. But, while expressing this view, we do not abandon or intend to modify the views which the majority of the justices entertained, originally—*i. e.*, that the plaintiffs' petition discloses a cause of action.

MR. JUSTICE BLANCHARD not having participated in the original opinions and decisions of the cause, takes no part in this opinion, and MR. JUSTICE BREAUX adheres to his original views.

Brief of Counsel for Appellees

Supreme Court of the United States

OCTOBER TERM, 1897.

Filed Jan. 31, 1898.

No. 4.

THE CITY OF NEW ORLEANS,
Appellant,

vs.

THE TEXAS AND PACIFIC RAILWAY COMPANY ET AL.

BRIEF FOR APPELLEES.

W. W. HOWE,
JOHN F. DILLON,
Counsel for Appellees.

C. A. Gardiner, Walker and Printer Service, N. Y.—1897.

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE CITY OF NEW ORLEANS, Appellant, vs. THE TEXAS AND PACIFIC RAILWAY COMPANY ET AL.	No. 3.

BRIEF FOR APPELLEES.

Statement.

This was a suit in equity brought by the Texas and Pacific Railway Company, as assignee of the New Orleans Pacific Railway Company and the Fidelity Insurance Trust and Safe Deposit Company against the City of New Orleans, praying that two ordinances adopted by the City Council of New Orleans repealing and abrogating certain rights and franchises theretofore granted to the New Orleans Pacific Railway Company be declared illegal and void, and praying that the rights thus sought to be repealed be declared valid and existing rights of the Texas and Pacific Railway Company, as assignee aforesaid.

From a decree of the Circuit Court for the Eastern District of Louisiana granting the relief prayed for, the City of New Orleans brings this appeal.

In order that the Court may clearly understand the relation of the complaining company to the City of New Orleans, growing out of these franchises, we shall

state *in extenso* and chronologically the facts disclosed by the record.

The New Orleans Pacific Railway Company was incorporated by Act No. 14 of 1876 of the General Assembly of the State of Louisiana, as amended by Act No. 12 of 1878, with power among others to locate, construct, lease, own and use a railroad to be built upon such a course or road as might be deemed expedient by a majority of the directors of said company, from a point on the Mississippi River at New Orleans or between New Orleans and Iberville Parish on the right bank of the Mississippi River, to the City of Shreveport, Louisiana, or Marshall or Dallas, Texas; and for this purpose the right of way was granted across or along, or upon any waters, water courses, river, lake, bay, inlet, street, highway, turnpike or canal within the State of Louisiana.

It being a great commercial advantage to the City of New Orleans to have said company locate its southern *terminus* within the city limits, the City Council on November 9th, 1880, by ordinance No. 6695, Administration Series granted the company the right to establish its terminus within the city limits; and further granted it rights of way on and through certain streets and places in tbe City of New Orleans. This ordinance is as follows:

"WHEREAS, the New Orleans Pacific Railway Company, a corporation organized and existing under Louisiana State laws, is vested with authority under an act approved February 19, 1876, as follows, to wit: 'To locate, construct, lease, own and use a railroad, with one or more tracks and suitable turnouts, of such gauge and construction and upon such a course or route as may be deemed by a majority of the directors of said company most expedient,' and to and between the points and places mentioned and implied in said act, and is hereby authorized 'to establish and main-

tain in the City of New Orleans proper freight and passenger depots,' and to construct wharves, piers, warehouses, yards, depots and stations; and to 'construct and maintain its said railroads, or any part of the same, and to have the right of way therefor across and along and upon any street, highway, turnpike or canal in the State of Louisiana which the course of said railways may intersect, touch or cross. Provided the said company shall preserve any street, highway, turnpike or canal which its said railways may so pass upon, along or intersect, touch or cross, so as not to impair its usefulness to the public unnecessarily'; and,

"WHEREAS, it is for the interest of the City of New Orleans that the Southern *terminus* of said railroad shall be fixed and established within the city limits; and,

"WHEREAS, the said New Orleans Pacific Railway Company is desirous of constructing its line of road on the east bank of the Mississipi, from a crossing near Baton Rouge, to some point in the City of New Orleans, between the new canal and Melpomene street, and to establish its terminus at such point, on condition that the city shall grant to the company the right to extend its tracks from such terminus into and through Claiborne street to Canal street, for passenger purposes; and shall also grant the right to extend its tracks from such terminus north of Claiborne street by the most convenient and practicable route through the public streets to the river front for freight purposes, with the right to operate the same by steam or otherwise, as is now done on the Belt railroad on St. Joseph street, and on the levees by other railroad companies in the City of New Orleans.

"Now, therefore, for the purpose of permanently securing to the City of New Orleans the advantages that will result from locating and maintaining the *terminus* of the said New Orleans Pacific Railway *within the city limits:*

"SECTION 1. Be it ordained by the Council of the City of New Orleans, That the New Orleans Pacific Railway Company be, and it is hereby, authorized and empowered to locate, construct and maintain a railroad, with all necessary tracks, switches, turnouts, sidings and structures of every kind convenient and useful and appurtenant to said railroad, upon lines and levels to be furnished by the city surveyor, to and from such point as shall be selected by such company

as its terminus, between the new canal, Claiborne canal and Carrollton avenue, with the right to establish and maintain at such point necessary depots, shops, shops, yards, warehouses and other structures convenient and useful for the transaction of its business, and to operate the same by steam or otherwise for the transportation of freight and passengers within the city limits.

"SEC. 2. Be it further ordained, That the said New Orleans Pacific Railway Company, or its assigns, be and they are hereby authorized and empowered to locate, construct and maintain an extension of its railroad, with all necessary tracks, switches, turnouts, sidings and structures of every kind convenient and useful and appurtenant to said railroad, upon lines and levels to be furnished by the city surveyor, into and through Claiborne street to Canal street, with the right to construct a passenger depot at or near the intersection of Claiborne street with Canal street; and to operate the same by steam or otherwise for the transportation of passengers; provided, that should it become necessary for the building of depot or laying of tracks to remove the Claiborne market, then the said New Orleans Pacific Railway Company obligate themselves to rebuild the same at their own expense on such lots to be purchased by the company as the city shall designate. The said market to be rebuilt under the supervision and instructions of the administrator of waterworks and public buildings.

SEC. 3. Be it further ordained, that the said New Orleans Pacific Railway Company, or its assigns, be and they are hereby authorized and empowered to locate, construct and maintain an extension of its railroad, with all necessary tracks, switches, turnouts, sidings and structures of every kind, convenient and usefnl and appurtenant to said railroad upon lines and levels to be furnished by the city surveyor, across Claiborne canal into and through such street as may hereafter be lawfully selected to the river front, with the right to extend its tracks through Front street, Water and Jackson streets, connecting with the depots of the Louisville and Nashville Railroad Company, Morgan's Louisiana and Texas Railroad, and the Chicago, St. Louis and New Orleans Railroad, and to operate the same by steam or otherwise for the transportation of cotton, tobacco, grain, merchandise, and other freight; or the said company may purchase, lease, control,

maintain and operate by steam or otherwise, any railway or railway tracks now existing in the streets of the City of New Orleans.

SEC. 4. Be it further ordained, That the right of way, franchises and privileges herein granted to the New Orleans Pacific Railway Company are granted only on condition and in consideration that the said grantee shall permanently establish the terminus of said road within the city limits and maintain said terminus during the existence of the charter of said company, for which period said right of way privileges shall last and should the said company at any time hereafter abandon its said road on the east side of the Mississippi river and its terminus within the city limits, then this grant shall cease and terminate, and be without force and effect from the date of such abandonment and the further condition that all construction work within the city limits shall be executed under the direction and supervision of the city surveyor and completed to the satisfaction of the administrator of improvements and the administrator of commerce; and it is still further made a condition of this grant that said railway company shall complete its road from the crossing of the Mississippi river, at or near Baton Rouge, to its terminus in this city within two years from the promulgation of this ordinance.

SEC. 5. Be it further ordained, That the rights herein granted *on Claiborne street* shall apply only to a railroad *for passenger purposes;* that the rights to be granted from north of the Claiborne canal to the river front and hereby granted along the river front and in parallel streets, shall apply to a railroad for freight purposes only, and shall not be used as a thoroughfare for the transportation of passengers without consent of this council."

Sec. 4 of this ordinance declares the condition on which the grants were made to be as follows:

1. That the grantees shall permanently establish the *terminus* of the road *within the city limits.*

2. That they shall maintain said terminus within the city limits during the existence of the charter of said company.

3. That all construction work done within the city

limits shall be executed under the direction and supervision of the city surveyor, and completed to the satisfaction of the Administrator of Improvements and the Administrator of Commerce.

4. That said grantees shall complete the road from the crossing of the Mississippi River at or near Baton Rouge to its terminus in this city within two years from the promulgation of *this* ordinance.

The ordinance just above stated having given to the company the right to select a street through which it might connect its tracks on Claiborne street in the rear of the city, with its tracks on the river front in the front of the city, on December 3d, 1880, the City Council adopted an ordinance *supplementary* to the ordinance No. 6695, Administration Series, and designated as No. 6732, Administration Series, whereby Thalia street was designated by the Council as the street through which the company should connect its tracks on Claiborne street with its tracks on the river front. This latter ordinance was as follows:

" WHEREAS, on the ninth day of November, 1880, the ordinance No. 6695 (Administration Series) was duly adopted, granting to the New Orleans Pacific Railway Company, or its assigns, the right to establish its terminus within the city limits, and to construct, maintain and operate a railroad to and from such terminus, with one extension for passenger purposes and another for freight purposes, into and through certain streets and places in the City of New Orleans; and it was contemplated by said ordinance that a street should be duly selected whereby the said company should have its rights recognized to lay a track from Claiborne street to the river front through a street to be selected; now, therefore,

" SECTION 1. Be it ordained by the City Council of the City of New Orleans that the New Orleans Pacific Railway Company, or its assigns, be, and it and they are hereby, authorized and empowered to locate, construct and maintain an extension of its railroad, with

all necessary tracks, switches, turnouts, sidings and structures of every kind, convenient and useful and appurtenant to said railroad, upon lines and levels to be furnished by the city surveyor across Claiborne canal, into and through Thalia street, to the river front, and to operate the same by steam or otherwise for the transportation of cotton, tobacco, grain, merchandise and other freight; or the said company may purchase, lease, control, maintain and operate, by steam or otherwise, any railway or railway tracks now existing in the streets of the city of New Orleans; provided, that there shall be but one track laid on Thalia street, from Claiborne to Water street.

"SEC. 2. Be it further ordained that the right of way, franchises and privileges herein granted to the New Orleans Pacific Railway Company are granted only on condition and in consideration that the said grantees shall permanently establish the terminus of said road within the city limits, and to maintain said terminus during the existence of the character of said company, for which period said right of way and privileges shall last; and, should the said company at any time hereafter abandon its said road on the east side of the Mississippi river and its terminus within the city limits, then this grant shall cease and terminate and be without force and effect from the date of such abandonment; and upon the further condition that the said company, at the time of laying their track upon Thalia street, shall pave said street from Pilie street to Rampart street, including all intersections of said Thalia street, with blocks of the best hard Boston granite, oblong in shape, not less than eleven inches and not more than fourteen inches in width, and not less than sixteen inches nor more than twenty-four inches in length, and from nine to ten inches thickness; they shall be well quarried, having paraliel sides and ends, and the upper side free from lumps. The blocks adjoining the gutter stones shall be cut at an angle of forty-five degrees with the sides, so as to be laid diagonally, and said pavement shall extend from curb to curb; and the said company shall at the time of laying their track pave with round or cobblestone pavement, laying with gutter stones the gutters of said street, from the end of the block, paving at Rampart street to Claiborne street, with the privilege of using for the pavement the cobblestones removed from that part of the street to be paved with square block, the

rails to be laid in the pavement so that the top of the rails shall be flush with the surface of the pavements and upon the further condition that said railway company shall at all times keep said pavement from curb to curb in repair; and the further condition that all construction work within the city limits shall be executed under the direction and supervision of the city surveyor and completed to the satisfaction of the administrator of improvements and administrator of commerce, and it is still further made a condition of this grant that said railway company shall complete its road from the crossing of the Mississippi river, at or near Baton Rouge, to the terminus in this city, within two years from the promulgation of this ordinance.

"SEC. 3. Be it further ordained, That upon the failure of said company to comply within three days with any notice of the department of improvements to repair any portion of the street or streets through which said company shall lay its tracks, they shall be fined twenty-five dollars for each and every day they fail to comply with said notice; said fine to be recoverable before any court of competent jurisdiction."

The conditions expressed in this supplemental ordinance are as follows:

1. That said grantees shall permanently establish the *terminus* of said road *within the city limits.*

2. That they shall maintain said terminus during the existence of the charter of said company.

3. That said company at the time of laying their track upon Thalia street shall pave said street.

4. That all construction work within the city limits shall be executed under the direction and supervision of the City Surveyor and completed to the satisfaction of the Administrator of Improvements and Administrator of Commerce.

These two ordinances, Nos. 6695 and 6732, Administration Series, contain the further stipulation or condition that should the said company at any time hereafter abandon its said road on the east side of the Mississippi River and its terminus with the city limits,

then this grant shall cease and terminate, and be without force or effect from the date of such abandonment.

In the early part of the year 1881, however, the New Orleans Pacific Railway Company, exercising the alternative privilege conferred upon it by its charter of running down either the left bank of the river from a point opposite or near Baton Rouge, to New Orleans, or crossing at Baton Rouge and running down the east bank to New Orleans, decided to run down the west bank to New Orleans, and accordingly purchased the railroad already constructed by the New Orleans, Mobile and Texas Railroad Company on the west bank of the Mississipi River, extending from Bayou Goula (a point near Baton Rouge on on the west bank) to Westwego, just opposite New Orleans, and also on the west bank of the river at or near which point it purposed crossing the river.

On March 29th, 1881, subsequent to this change of route, the City Council, recognizing and acquiescing in this change (as will appear from the preamble), adopted Ordinance No. 6938, Administration Series, as *amendatory of and supplementary to* Ordinances Nos. 6695 and 6732, Administration Series, as follows:

"WHEREAS, the New Orleans Pacific Railway Company has purchased the road heretofore constructed under the charter of the New Orleans, Mobile and Texas Railroad Company, on the west bank of the Mississippi River, between Bayou Goula and Westwego, and with a view to maintaining and operating the said road in connection with and as a part of its through line to and from its terminus in New Orleans, designated in Section 1 of Ordinance No. 6695, Administration Series, passed on the ninth day of November, 1880; such line to cross the Mississippi River from a point at or near Westwego to a point on the east bank of the river in front of the Upper City park, late Fou-

cher property; thence to extend by the best and most practicable route to designated terminus, between the new canal, Claiborne canal and Carrollton avenue:

"NOW, THEREFORE, for the purpose of securing to the City of New Orleans the advantages that will result from locating and permanently maintaining the terminus of the New Orleans Pacific Railway within the limits of the City of New Orleans, as hereinabove recited:

"SECTION 1. Be it ordained by the council of the City of New Orleans, that the New Orleans Pacific Railway Company, or its assigns, be, and are hereby, authorized and empowered to locate and maintain a railroad with all necessary tracks, switches, turnouts, sidings and structures of every kind convenient, useful and appurtenant to said railroad, from such point on the river front as its crossings from Westwego shall be located at in the vicinity of the Upper City park, along the western border of the said city park, and from thence by the best and most practicable route to its designated terminus east of Carrollton avenue.

"SECTION 2. Be it further ordained, etc., that the City of New Orleans agrees to lease unto the New Orleans Pacific Railway company, its successors and assigns, for the period of ninety-nine years, and at the price of five hundred dollars per annum, payable annually in advance, all that strip or parcel of ground on the river front of said Upper City park, south of Tchoupitoulas street, or south of an extension of Tchoupitoulas street, in a westwardly direction, and between a prolongation of the east and west boundary lines of said park to the river, with all the batture formed thereon, or which may form during the term of said lease, with the right to establish and maintain upon said grounds such *ferry facilities*, wharves, piers, warehouses, yards, *tracks*, *depots*, *stations*, *sheds*, elevators and other structures, as shall be necessary and convenient for the transfer of cars, engines, passengers and freight, *and in the transaction of its business.* No vessel shall occupy or lie at such wharves without the consent of said company, its successors or assigns, and all vessels lying at or using said wharves with such consent, shall be exempt from the payment of levee or wharf dues to the City of New Orleans; *the proceeds of such lease shall be applied by the city to the improvement of said park.*

SEC. 3. Be it further ordained, etc., that the said

New Orleans Pacific Railway Company, its successors and assigns, shall have the right to extend *its* tracks from the said ground so leased between the Upper City park and the river front, easterly along said river front to connect with the belt road at Louisiana avenue, *and* to connect at Jackson street with tracks heretofore authorized to be constructed between Jackson and Julia streets by Section 3 of Ordinance 6695, Administration Series, adopted November 9th, 1880, and by ordinance No. 6732, same series, adopted December 3, 1880, provided that between Louisiana avenue and Jackson street *the trains of said company* shall be run only between sunset and sunrise on said track, except in case of emergency and necessity beyond the reasonable control of the company.

SEC. 4. Be it further ordained, etc., that the said New Orleans Pacific Railway Company, its successors and assigns, shall have the right, and the same is hereby conferred for the term of its charter and from and after the expiration of the existing lease of city wharves, to enclose and occupy for its purposes and uses, that portion of the levee, batture and wharf in the City of New Orleans in front of the riparian property, acquired or to be acquired, between Thalia and Terpsichore streets, and to erect and maintain thereon at its own expense such *ferry facilities, wharves, piers,* warehouses, elevators, yards, tracks, depots, *stations,* sheds and other structures as shall be necessary and convenient for the *transfer of cars, engines, passengers and freight, and in the transaction of its business.* No vessel shall occupy or lie at such wharves without the consent of said company or its successors or assigns, or discharge or receive cargo thereat, and all vessels lying at or using said wharves by such consent and on the business of the company shall be exempt from the payment of levee or wharf dues to the City of New Orleans.

Said wharves and other structures shall be lighted and policed by said company at its own expense.

Any vessel lying at these wharves with the consent of the company, but not on its business, or not for the purpose of discharging or receiving freight or passengers to or from said company as a carrier, shall be liable to the city for usual wharf or levee dues.

Any vessel using said wharf to receive any freight not coming to or going from said company as a carrier shall pay usual wharfage dues to the city.

In consideration of the permission herein given, the company will build three hundred feet *of new wharf* at such point between Terpsichore and Jackson streets, *for the city*, as the administration of commerce may indicate, and will pave Pilie street between Thalia and Terpsichore streets, and Terpsichore street between Pilie and front with square blocks of granite or with blocks of compressed asphalt, and keep the same in good order.

The rights conferred by this section shall not be held to interfere with the rights of the city to police any part of the river front.

SEC. 5. Be it further ordained, etc., that the Mayor be, and he is hereby, authorized and directed to enter into a proper notarial contract of lease for the purpose of carrying out the provisions of the second section of this ordinance.

SEC. 6. Be it further ordained, etc., that the right of way, franchises and privileges *herein* and *heretofore* granted to the New Orleans Pacific Railway Company *are and were* granted on condition and in consideration that the said grantee shall permanently establish *its terminus* within the city limits, and shall maintain said terminus during the existence of the charter of said company, for which period the said franchises, rights of way, grants and privileges shall last and continue; and should the said railway company, at any time hereafter, *remove its terminus* from within the city limits, then this grant shall cease and terminate and be without force and effect from the date of such removal; and the further condition that the construction work within the city limits shall be executed under the direction and supervision of the city surveyor, and completed to the satisfaction of the administrator of public improvements and the administrator of commerce; and the further condition that said railway company shall construct or control a line of road, ready for public use, from *a crossing* of the Mississippi River *to its designated terminus in this city*, within two years from the promulgation of this ordinance."

By Section 6 of this *amendatory* and *supplemental* ordinance, it is declared that the conditions upon which the rights *herein* and *heretofore* were granted, *are* and *were* as follows:

1. That said grantees shall permanently establish *its terminus within the city limits.*

2. That they shall maintain said terminus during the existence of the charter of said company.

3. That the construction work within the city limits shall be executed under the direction and supervision of the city surveyor, and completed to the satisfaction of the Administrator of Improvements and the Administrator of Commerce.

4. That said grantees shall construct *or control* a line of road *ready for public use* from *a crossing* of the Mississippi River to its designated terminus in the City of New Orleans, within two years from the promulgation of *this* dinance.

It will be noted that in the preamble the city recognized and approved :

1. The change of route from the east bank from or near Baton Rouge to the west bank, and did not impose the condition contained in former ordinances that the company should maintain its road on the east bank between Baton Rouge and New Orleans.

2. The change of crossing of the Mississippi River from "a point at or near Baton Rouge" to "a crossing of the Mississippi River."

It will further be noted that the City by Sections 2 and 4 of this ordinance granted to the Company the same and equal *terminal* privileges on the upper Park batture and on its Thalia Street property in the front of the City, as it did by Section 1 of Ordinance 6695 A. S. in the space between the New Canal, Clarborne Canal and Carrollton Avenue in the rear of the city, thus giving the Company the *option* of designating and establishing a terminus or termini at one or all of these places.

Subsequently, but prior to July, 1882, the company established a crossing of the Mississippi River opposite Thalia street, a short distance below Westwego, called Gouldsboro, and permanently established a terminus at Thalia street and the levee on the east bank of the river within the city limits, where it laid a quantity of tracks and erected, under the above-mentioned grants, large freight and passenger depots, yards, ferry facilities, etc., and connected same with the crossing. This was done under Section 4 of the last-named ordinance on the riparian property of the railway company, fronting eight hundred feet on the Mississippi River between Thalia and Henderson streets, at a cost for land and buildings of six hundred and twelve thousand dollars.

Thereafter, on July 11th, 1882, the city council adopted ordinance No. 7946, Administration Series, as *supplementary* to said ordinances Nos. 6695, 6732 and 6938, Administration Series, for the purpose especially of carrying into effect Section 2 of Ordinance No. 6695, Administration Series, relating to the manner of removal of the Claiborne Street Market House, in order that the company might occupy said street to reach a passenger depot which it had also been given the right by said Ordinance No. 6695 to establish at the crossing of Claiborne and Canal streets. This ordinance is as follows:

MAYORALTY OF NEW ORLEANS,
CITY HALL, July 11th, 1882.

(No. 7946, A. S.)

An ordinance *supplementary to ordinances 6695, 6732 and 6938*, administration series, granting certain rights to the New Orleans Pacific Railway Company and its assigns, and providing for the selection of a site for the Claiborne market.

WHEREAS, by section 2, of ordinance 6695, administration series, a right was given to the New Orleans Pacific Railway Company, or its assigns, to locate, construct and maintain an extension of its railroad through Claiborne street, with a right to construct a passenger depot on the neutral ground of Claiborne street, at or near the intersection of Claiborne street with Canal street, with a proviso that should it become necessary for the building of the depot or laying tracks to remove the Claiborne market, then the New Orleans Pacific Railway Company, or its assigns, should rebuild the same at their own expense on such lots as the city shall designate; and

WHEREAS, by ordinances Nos. 6732 and 6938, administration series, certain rights have also been granted to said company and its assigns with reference to the said Claiborne street and to Thalia street, *and the company has built its road from Baton Rouge to New Orleans, crossing Thalia street, and established its terminus in the city limits at Thalia street and the levee,* and is preparing also to cross from Westwego to the City park, and thence to Claiborne street; now, therefore,

Section 1. Be it ordained by the council of the City of New Orleans, that the Administrator of Improvements, the Administrator of Commerce, and the Administrator of Water Works and Public Buildings, be, and they are hereby, authorized and directed, within sixty days from the passage of this ordinance, to select such lots as may be needful and proper for a new site for said market; and when such selection shall have been made they shall deposit a process verbal thereof in the office of the Administrator of Water Works and Public Buildings.

Sec. 2. Be it further ordained, that whenever said company or its assigns shall find it necessary to remove said building it shall be rebuilt on said lots so selected and as prescribed in said original ordinance.

Sec. 3. Be it further ordained, that in crossing the new canal under its charter, and according to the said ordinances, the said railway company, or its assigns, shall do so by means of a proper drawbridge.

Adopted by the Council of the City of New Orleans, July 11th, 1882.

JOS. A. SHAKSPEARE,
Mayor.

(A true copy.)
GEO. W. FLYNN,
Secretary.

In the preamble to this ordinance it will be noted that the fact is recited that the company *had built its road from Baton Rouge to New Orleans; had made a crossing of the Mississippi River at Thalia street; had established its terminus in the city limits at Thalia street and the levee;* and was preparing to cross also from Westwego to the City Park, and thence to Claiborne street.

These recitals have never been disputed or denied, and could not be, and, according to the uncontradicted testimony of E. B. Wheelock and Robert Strong, were true in every particular.

The road of the company was completed from Shreveport and Baton Rouge to New Orleans, prior to July, 1882, and was ready and open for public use prior to that date (p. 65).

By articles of consolidation and merger, filed and recorded in the office of the Secretary of State, The Texas and Pacific Railway Company, on June 20th, 1881, became the owner of all the franchises and grants made to the New Orleans Pacific Railway Company by the above-enumerated ordinances, and took possession in September, 1882. This is not disputed.

After the passage of the ordinance No. 7246, of July 11th, 1882, the officers of the company made demand on the city officers named by said ordinance, for that purpose, to designate the lots to which the company should remove the Claiborne market preparatory to laying their track and building a passenger station on Claiborne street; but though demands were made, the city officers neglected or refused to designate said lots, notwithstanding the company expressed itself as anxious and willing to at once comply with its obligations relating thereto; and not until this day have such lots been designated by the city as required under the

terms of these ordinances. The right on Claiborne street was for passenger purposes only, and could not be availed of so long as there was no place for a passenger depot at the provided point.

The City Charter of 1870 and the government by the administrators was repealed in June, 1882, and the new Charter of 1882 went into effect in November of that year (Acts of 1882, pp. 14–37). In the meantime a controversy arose between the City Surveyor, Mr. Brosnan, under whose direction the work had thus far been done, so far as his direction was required, and Mr. Wheelock, the agent of The Texas and Pacific Railway Company, and the president of the New Orleans Pacific Railway Company, as to further lines to be given between Louisiana avenue and Jackson street on the river front. The company was plainly entitled to lines on the river front from Louisiana avenue to Jackson street, and it would hardly be expected that it could proceed with the plan of the ordinances when such a gap was left, extending for about a mile and a half. The company claimed the lines under Section third of the ordinance No. 6938, by which it is apparent *its tracks* were to extend along the river front from Louisiana avenue to Jackson street, with certain provisos as to their use. This controversy continued for a time, and finally resulted in the New Orleans Pacific Railway Company bringing an action of mandamus in 1883, which was defended and which is still pending (p. 85).

Soon after, in 1884, the City Council, which seemed to be hostile under this new regime, passed one of the repealing ordinances involved in this case, being the ordinance No. 685 C. S., of April 24th, 1884, as follows :

MAYORALTY OF NEW ORLEANS,
CITY HALL, April 24th, 1884.

(No. 685, council series.)

An ordinance repealing certain sections of the ordinance No. 6938, A. S., granting privileges to the New Orleans Pacific Railway Company.

Be it ordained, That section two (2) of the ordinance No. 6938, A. S., passed March, 1881, granting to the New Orleans Pacific Railway Company a lease of the Upper City Park batture property, be, and the same hereby is, repealed and revoked.

Adopted by the council of the city of New Orleans, April 15th, 1884.

M. MCNAMARA,
Clerk of Council.

Approved April 24th, 1884.
W. H. BEHAN,
Mayor.

In June, 1886, the City Council passed the other repealing ordinance, No. 1828, of which appellees complained in this clause, as follows:

MAYORALTY OF NEW ORLEANS,
CITY HALL, June 16th, 1886.

(No. 1828, council series.)

An ordinance repealing certain rights granted to the New Orleans Pacific Railway Company under ordinance No. 6695, A. S., adopted November 9th, 1880; No. 6732, A. S., adopted December 3rd, 1880; No. 6938, adopted March 29th, 1881; No. 7946, adopted July 11th, 1882; and

WHEREAS, the city of New Orleans granted to the Pacific Railway Company the right to extend its track through Claiborne street to Canal; to erect a passenger depot on Claiborne street, near Canal street; construct tracks from Claiborne street to and through Thalia street to the river; and

WHEREAS, the original grantee company has merged its identity with that of an *alien* corporation, which it-

self is now in the hands of a receiver appointed on the prayer of an *alien* corporation; and

WHEREAS, such rights were granted on various conditions which have not been complied with, and the delay for so doing has elapsed; and

WHEREAS, by the acts of said New Orleans Pacific Railway Company such rights have been abandoned, and it is necessary for the public good that Claiborne street between Common street and the old basin shall be used for steam and horse railway and depot purposes;

Therefore, be it ordained by the council of the city of New Orleans that all rights of way *on Claiborne street, and rights to establish a passenger depot on said street*, and rights to connect any steam or other railway by the New Orleans Pacific Railway Company through or on Claiborne street or to erect any depot thereon, whether acquired through or by the ordinances above enumerated, or through or by any other ordinance of the council of the city of New Orleans be, and the same are hereby, repealed and revoked.

Adopted by the council of the city of New Orleans, June 8th, 1886.

W. H. MICHEL,
Assistant Clerk of Council.

Approved June 16th, 1886.
D. M. KILPATRICK,
Mayor *pro Tem.*

Thereupon the complainants The Texas and Pacific Railway Company and the Fidelity Insurance, Trust and Safe Deposit Company, of Philadelphia, to which latter company all these rights were mortgaged to secure an issue of over five million dollars of bonds, filed a bill in this case to declare the two repealing ordinances to be illegal, and to remove the cloud caused by their presence. The transcript shows also at pages 68–70 that, by a suit in the Civil District Court for the Parish of Orleans, in which a supplemental petition was filed as late as December 14th, 1888, the City of New Orleans was asking a large money judgment

against the New Orleans Pacific Railway Company for certain paving on Terpsichore and Pilie streets, the company's Thalia street terminus; and in this suit, which is still pending, with sundry and sufficient defenses, the city admitted and asserted the existence of the rights granted by the three ordinances Nos. 6695, 6732 and 6938, Administration Series, and admitted that the company *had availed itself of those rights* so far as to establish its terminus, crossing, &c., at Thalia street, as also shown by the ordinance No. 7946, Administration Series, already quoted.

There is no dispute that the terminus of the New Orleans Pacific Railway Company was established at Thalia street and the river, on the east side of the Mississippi, and within the city limits, prior to July 11th, 1882, and that its road at that time was established and ready for public use from the tracks at that terminus on the east side of the Mississippi River to the crossing of the river at Thalia street between Thalia and Terpsichore streets, and thence across to the west bank and to Baton Rouge and Shreveport prior to July, 1882. Mr. Wheelock, page twenty-five *et seq.*, gives some of the particulars in regard to this matter, and to save a mass of unnecessary details the testimony of Mr. Wheelock and of Mr. Robert Strong was taken by consent in a succinct manner, and is found at pages 64 and 65. They both state as follows:

"The recitals of the ordinance of the City of New Orleans, No. 7946, A. S., July 11, 1882, are correct as a matter of fact. The terminus therein referred to as having been established in the city limits was established *prior to July, 1882*, by the New Orleans Pacific Railway Company, as stated, and conveyed to the Texas and Pacific Railway Company by consolidation. The Texas and Pacific Railway Company went into actual possession about September, 1882, and has

maintained this terminus, which is a permanent one, in the city at that point ever since. The terminals there are very large and valuable, and are assessed for taxation at $612,000.

"The New Orleans Pacific Railway Company constructed and controlled a line of road ready for public use *from a crossing of the Mississippi River to its said designated terminus* in this city within two years from November 4, 1880, and March 29, 1881, *and prior to July, 1882.*

"The road has been opened to public use and operated ever since by the New Orleans Pacific Railway Company and its assigns and transferee The Texas and Pacific Railway Company. It may be briefly described as extending at that time and now from the Thalia street terminus in New Orleans, where it has a large number of tracks, thence to the crossing of the Mississippi River from Thalia and Terpsichore streets; thence to Gouldsboro, on the right bank of the river, by transfer boats on which the cars are crossed; thence to Baton Rouge Junction and Baton Rouge, and from Baton Rouge Junction on to Shreveport and El Paso, Texas.

"The railroad so constructed and completed in 1881 and July, 1882, has been operated ever since. Though it was out of repair somewhat when Mr. Pitkin's report was made in the receivership suit No. 11,181, it was repaired by the Receivers and restored by the Court to the complainant company in October, 1888.

"It was always maintained as a railroad, and though it was out of repair at the time of Mr. Pitkin's report, *was always operated*, and was put in repair and restored to the company when the receivership terminated in 1888.

"As a matter of fact the strip or parcel of ground leased by Section 2 of the Ordinance No. 6938, A. S., is accretion or batture outside of the River road, or Tchoupitoulas street, in front of the Upper City Park, now called Audubon Park. The public levee extends along the outer edge of this Tchoupitoulas street, or the River road, and the said strip or parcel is outside of the public levee. It is covered by water at high water, and can only be utilized by being filled up."

There is no dispute that in the establishment of this terminus and its connected crossing at ~~Tchoupitoulas~~ Thalia

street the railway company built a new wharf under section four of the ordinance No. 6938, A. S., under the direction of the city surveyor, and to the satisfaction of the administrators mentioned in the ordinance, and paid for it upon such acceptance the sum of $5,000.

Nor is it disputed that under the lease established by section 2 of the same ordinance, of the batture in front of the upper city park, outside the public levee, the railway company paid the City of New Orleans two annual installments of rent, amounting to $1,000, which was to be devoted to the improvement of the park itself, lying behind Tchoupitoulas street, and that the city has never returned or offered to return that money (p. 27).

Some nine months after the suit was begun, and after argument, the Hon. D. A. PARDEE, Circuit Judge granted an injunction *pendente lite* as prayed for in the bill and supplemental bill, and, after further hearing on the merits and careful advisement, the District Judge, sitting in the Circuit Court, rendered the final decree in favor of the railroad company and the trust company (p. 86), declaring the two repealing ordinances in question to be illegal and injurious, and enjoining their execution and recognizing the rights of the company as claimed under the ordinance as existing and valid grants; decreeing, however, with reference to the lease of the park batture, that the declaration as to its existence and validity should be without prejudice to any rights which the City of New Orleans, as successor to the late Park Commission, or as having the administration of the Audubon Park vested in by law, may have in limitation or control of the rights, the grant of which was confirmed, springing out of the designation of the said

Audubon Park as a public place (pp. 86, 87). The City of New Orleans took its appeal (p. 88), but made no assignment or specification of error.

ARGUMENT.

FIRST POINT.

Under the law of Louisiana the City of New Orleans could not lawfully repeal the ordinances conferring rights on the Railway Company.

It may be a convenience to the Court to discuss firstly a point on which alone the decree should be affirmed as to both repealing ordinances, and certainly No. 1828, A. S., which undertakes to rescind our rights to a passenger track and a passenger depot on Claiborne street.

It should be premised that we by no means concede that the railway company has failed to perform the conditions of the grants. On the contrary, we maintain with confidence that they have been performed. But if it should be seen that a consideration of our first point will dispense the Court from further examination of the case, it would seem but proper to adopt such an order of argument.

All the conditions upon which the grants sought to be repealed were made are what are known in the civil law and in the law of Louisiana as resolutory conditions, which resemble the conditions subsequent of the common law, when such conditions operate to

defeat an existing grant. There can be no doubt that this case is governed by the law of Louisiana, the situs of the city and the property, and that the exposition of that law by the highest Court of the State will be followed by this tribunal.

Article 2045 (2040) of our Revised Civil Code of 1870 provides as follows:

"ART. 2045 (2040). The dissolving condition is that which, when accomplished, operates the revocation of the obligation, placing matters in the same state as though the matter had not existed.

"It does not suspend the execution of the obligation; it only obliges the creditor to *restore what he has received*, in case the event provided for in the condition takes place."

And Article 2047 (2042) provides as follows:

"ART. 2047 (2042). In all cases the dissolution of a contract may be demanded by suit or by exception; and when the resolutory condition is an event not depending on the will of either party, the contract is dissolved by right; but in other cases *it must be sued for*, and the party in default may, according to circumstances, *have a further time allowed for the performance of the condition.*"

In the case of Gayden vs. Louisville and Nashville Railroad Company *et als.*, 39th Ann., 269, the plaintiff by a deed dated August 19th, 1882, had granted a right of way to the railway company, 100 feet wide, on a line to be adopted by the company with the express agreement that should the railroad not be built within eighteen months of the date of the agreement, the contract should be null and void. The suit, as the Court states, was brought on the assumption that the condition of building within eighteen months not having been complied with the contract was null and void. The railroad was not completed within the

eighteen months, and not until nearly two years after the date of the grant. The Court held that the provision that the contract should be null and void if the railroad should not be built within eighteen months from the date of the agreement, was plainly a resolutory condition, and that the plaintiff might have a standing but for this contract of August 19th, 1882, and that hence the question was whether that contract had or had not been dissolved. The Court conceded that the contract provided that should the railroad not be built within eighteen months from its date, then the contract should be null and void; and conceded that the road had not been built within that time. But the Court held that it did not follow on that account that the contract was *ipso facto* dissolved. The Court cited the Article 2047, referred to above, declaring that the delay beyond the term of eighteen months was an act dependent on the will of the parties and that the dissolution of the contract must be judicially sought, and gives the equitable reason why such a provision has been made by the legislator, saying among other things that the grantor might have prevented the performance himself. In other words, it was distinctly held that the agreement that the contract should be null and void if the railroad should not be built within 18 months from the date of the agreement was resolutory in its character, and that if the railroad company did not build within the 18 months, the grantor must apply to the Court for a dissolution of the contract, and then the Court will determine whether it should be dissolved, and if the dissolution should be decreed, the Court might give time to the railroad company to fulfill the resolutory condition.

Among other things the Court said the building of

that road within that time was a resolutory condition, which by non-compliance might have the effect of dissolving the contract, as the event was dependent on the will of the defendant; *but the dissolution could not take place and be enforced unless judicially demanded and declared.*

In the case of the Southern Chemical and Fertilizing Company, Limited, vs. B. J. Wolf & Sons, 48th Louisiana An., 631–641, the Supreme Court of Louisiana was considering the grant made by the City of New Orleans to a garbage company, under a city ordinance, and recognized the doctrine for which we now contend. At page 641 the Court said:

"Plaintiffs' occupation and business rest, as we have said, upon a conventional contract, which fixes its continuance for twenty years. They have *vested rights* in this matter of which they cannot be divested by either the whim, the caprice or the dissatisfaction of the council. *A rescission of their contract could only be brought about through proceedings in which would be subjected to judicial scrutiny and determination, by judicial tests, the respective rights and obligations of the parties.*"

In the case of the City of New Orleans vs. The Wardens, &c., 11th Louisiana An., pages 244, 245, the City undertook to repeal an ordinance granting permission to the Church of St. Louis to establish a cemetery on certain land purchased near the Bayou St. John. The Wardens of the Church thought the grant amounted to a contract, and that they had a vested right of which the City could not deprive them without their consent. The counsel for the City claimed that the City might repeal the ordinance and leave the defendants to their action for damages. The Court held that the doctrine that the City of New Orleans had a right to violate a contract, and redress was to be had

only in damages against the City, was as unsound as it was novel.

In such an action it would, of course, be necessary for the party suing for the purpose of rescission, to return or tender back what it had received by reason of the contract, and to put the defendant in default by a proper demand.

McDonald vs. Vaughan, 14 Annual, at p. 717.

Latham vs. Hickey, 21 Annual, 425, 426.

The City of New Orleans has done none of these things, and as to the lease of the batture in front of the Upper City Park, it is conceded that the railway company paid two annual installments of rent and tendered another, and that the two installments, amounting to $1,000, received by the city, have been retained by it and never returned or tendered back.

Considering now the two repealing ordinances from the point of view of the well-settled and interpreted law of Louisiana, we find those repealing ordinances to be very peculiarly illegal in their character.

They do not indicate any demand having been made upon the railway company for a compliance with any duty in reference to the rights sought to be repealed, nor any putting in default, nor any required action in and by a Court. The ordinance No. 685, C. S., gives no reasons whatever for its extraordinary action. The ordinance No. 1828, C. S. (Transcript, p. 7), finds no fault with our terminus as established on the river between Thalia street and Terpsichore street, and there is utterly no reason why such fault could be found. It refers to the ordinance No. 7946, A. S., of July 11th, 1882, and does not pretend to deny any of its recitals.

It does not deny that the company had built its road from Baton Rouge to New Orleans, crossing at Thalia street, and had established its terminus in the city limits at Thalia street and the levee. It could not deny that this terminus and tracks were on the east side of the Mississippi River in the city limits, and connected with the crossing of the Mississippi River from Thalia street and Gouldsboro', and that the line of the railroad had been completed in this way from the terminus in the city limits on the east side of the Mississippi River, thence to Gouldsboro', Bayou Goula and Baton Rouge by the crossing from Baton Rouge Junction and Shreveport, far within any time limit. The ordinance exhibits on its face the marks of haste, of passion and of prepossession. It undertakes to rescind the rights in Claiborne street only, of passage and of the erection thereon of a passenger depot. It gives the extraordinary reasons that the New Orleans Pacific Railway Company had merged itself with an alien corporation, well knowing that alien corporation to be the Texas and Pacific Railway Company established by the National Congress.

It further set up the pretext that that alien corporation was at that moment in the hands of a Receiver appointed on the prayer of an alien corporation; that complaining corporation being the Missouri Pacific Rail-Company, created by our sister State of Missouri. It further alleged that the rights on Claiborne street had been abandoned, though it did not pretend that we had abandoned our terminus within the city limits, or its connections or crossings.

It then proceeded to recite that the public good required that Claiborne street between Common street and the Old Basin should be used for

steam and horse-railway depot purposes; thus admitting the propriety of the grant to us of the netural ground in Claiborne street for a passenger depot, and at the same time concealing the fact that the city herself was in default under the Ordinance No. 7946, A. S., for not designating lots for us to buy and to which the Claiborne market could be removed. Such proceedings certainly indicate haste and passion.

The animus may, perhaps, be found in the fact that the Charter of 1870, under which our ordinances had been adopted, had been repealed in 1882, and the new Charter of 1882 had gone into effect in November, 1882. The administrators, who had formed this plan of improvement were swept out of official existence, and a new council had come in, whose doings in general we may, in all charity, leave without further comment.

The best excuse we could make for these repealing ordinances is that they were passed without any consideration or knowledge of the law of Lousiania upon the subject. This law was ignored in the passage of these repealing ordinances. The City of New Orleans has never put the company in default; has never made any return or tender of return to place things as they were before the grant; and has never brought any suit to dissolve the contracts evidenced by the grants she has thus sought to repeal. If she had the right to take some such affirmative action, which we deny, she has never done so.

If she had the right to take any action in this cause, she has not done so. It is elementary that, if the defendant in equity desires affirmative relief, a cross-bill must be filed. There is no cross-bill in this case. It is, therefore, scientifically certain that the repealing

Ordinance No. 1828 is illegal, and a cloud that ought to be removed in equity, and was properly so declared by the decrees below. The repealing Ordinance No. 685, concerning the batture in front of the park, is, we submit, equally illegal for the same reason, unless, indeed, the grant in that matter was one of those absolute nullities, *ab initio*, which could not have been lawfully enacted at all.

It will not be denied that, in view of the law of Louisiania and her jurisprudence, it is the custom in contracts, when it is intended that they should be dissolved, *ipso facto*, by breach of resolutory conditions—that is, conditions subsequent going to defeat a grant—to insert some such clause as this: "In case such condition be not complied with, then this contract shall be dissolved, *ipso facto*, without any return or tender, or any putting in default or any suit or application to a court." Nor will it be denied that similar clauses are put in city contracts, and that in their absence the city brings suits to annul and rescind. Such suits are pending now as to other grants to other corporations.

SECOND POINT.

The lease of the use of the batture in front of the Upper City Park was a valid act, and was not ultra vires the City Council of New Orleans.

The city contends that the lease of the use of the batture in front of the Upper City (now Audubon) Park to the New Orleans Pacific Railway Company

under Section 3 of Ordinance 6938, A. S., was void *ab initio*, being *ultra vires* the City Council, and that the Council had the right, therefore, to repeal same at any time, without resorting to the Courts to annul it. That Ordinance 685, C. S., was, for this reason, a valid enactment.

The position of the appellees is that the City Council, acting under the powers conferred by legislative charter, as well as under the sanction of general law, could validly, in behalf of the municipal corporation as such, make a *lease* of the *batture* in front of said property and outside of the levee, regardless of its relation to the ownership or administration of the park property proper.

The lease made by Section 3 of said Ordinance No. 6938, A. S., was of the *batture* in front of the park, and was for a term of 99 years at an annual rental of $500, which sum was to be applied by the city to the improvement of the park.

Under the terms of the lease the company was given the right to construct wharves, landings, etc., on the batture for the use of its business. The city actually received, and has since retained, the sum of $1,000 for two years' rent of the batture, and subsequent installments were duly tendered, but refused.

There has never been any dispute as to the character of the property affected by this lease. It is described in the testimony of Wheelock and Strong (Tr., pp.) as accretion or batture, lying outside of the river road (Tchoupitoulas street) in front of the Upper City (now Audubon) Park, and outside of the levee, which extends along the outer edge of this Tchoupitoulas street. It is covered by water during high water, and is properly called accretion or batture, being the grad-

ual deposit made by the river in front of the park property and outside of the levee.

Bouvier's Law Dict., *verbo* Batture.
Hollingsworth vs. Chaffee, 33 Ann., 548.

Being outside of the levee, it forms a part of the river bank, since, by the law of Louisiana (Rev. Civ. Code, Art. 457), on the Mississippi River and other navigable streams where there are levees established according to law, the levees form the banks of the river. This fact is important to bear in mind, as it has direct bearing on this question. For, by the law of Louisiana (R. C. C., Art. 456), while an imperfect ownership of the river banks is in the riparian proprietor, still the *use* of the river bank is *public*, and any person is at liberty (except in incorporated cities) to freely land his boats and unload goods thereon. We say except in incorporated cities, for, by the charters of most cities, and especially by the Charter of the City of New Orleans then in force (Act of 1870), the use, administration and control of the river banks within the city limits are vested in the municipality, and it may, consequently, by virtue of such statute, as well as by the general law (R. C. C., 863) construct on the river banks such facilities for commerce as it may deem necessary, and regulate and control the use thereof.

This right of *use* and administration is entirely irrespective of ownership, and every riparian proprietor within the city limits holds his title to batture subject to the exclusive use and administration by the city, which has not only the power of using it for public purposes, but even may prohibit the riparian proprietor from using it for his own purposes, and may compel the demolition and removal of works put there by him.

In the leading case of Municipality No. 2 against

Orleans Cotton Press, 18th Louisiana, 122, the subject was examined and decided at great length. In the leading opinion, at page 228, the Court said:

"The arguments of the counsel drawn from the supposed inconvenience of having a part or any part of its bank owned by individuals, and the danger of the public being excluded from the use of it to the great detriment of commerce, would be entitled to serious consideration, if it were not true at the same time that the public, through the agency of the corporation, has the sole use of the levee and of the bank of the river. That the front proprietors cannot extend the levee without the consent of the corporation, and that the city authorities have a right to make all improvements for rendering the whole most useful to the public and favorable to commerce. So far as it concerns the public convenience it seems to be of little importance whether the future increase of the batture shall be decided to belong to the public or to the front proprietors so long as the municipal authorities alone have the entire control of everything on the outside of the levee and have a right to establish wharves and other conveniences which commerce may require. In most of the seaports of the Union it is believed the wharves are private property. Here they will be public, whoever may be considered the owner of the bank of the river, subject to the public use. The Louisiana Code is explicit on this point:

"'The use of the banks of navigable rivers or streams is public, &c., nevertheless the property of the river bank belongs to those who possess the adjacent lands. On the borders of the Mississippi where there are levees, the levees shall form the banks.'"

In Ruch vs. The City of New Orleans, 43 An., 275, the Court went even further and held that where it was necessary by the wearing away of the bank to use some of the front proprietors, land for public purposes, it might be done and without compensation, saying at page 280:

"The right of appropriation proceeds upon the principles decided in Remy vs. 2d Municipality, 11th Annual, 161, that the riparian owner enjoys his property *sub modo, i. e.*, subject to the right of the public to reserve space enough for levees, public roads and the like. Over this space the front proprietor never

acquires complete domination. It never passes free of this reservation by deed to the purchaser" (Pecot vs. Police Jury, 41st An., 706; Heirs of Leonard vs. Baton Rouge, 39th An., 275; Morgan vs. Livingston, 6th Martin, 231; Municipality vs. Cotton Press, 18th Louisiana, 239).

"From the many authorities cited in this decision it is plain that the law of Louisiana is correctly cited above."

In Eldridge vs. Trezevant, 160th U. S., pages 452, 455, the Supreme Court of the United States cited the case of Ruch vs. New Orleans from the 43d An., to the effect that the riparian owner enjoys his property *sub modo; i. e.*, subject to the right of the public to reserve space enough for levees, public roads and the like; that over this space the front proprietor never acquires complete domination; it never passes free of this reservation to a purchaser.

So in the case of Watson vs. Turnbull, 34th Ann., 856, which was a suit by a riparian owner to enjoin Turnbull and the City of New Orleans from placing "hitching posts" or clusters of piles along the river bank in front of his property, with a view of making a coal boat landing at that point, the Court, at page 857, said:

"Within the corporate limits, the City of New Orleans, under her charter and under the general law, has the right to control, manage and administer the use of the river banks for the public convenience and utility; to establish wharves and landings; to erect works and provide facilities for the use of vessels and water craft; and to charge just compensation for the use thereof. Riparian proprietors have no right to appropriate to their exclusive use these banks, and they have no private property in the *use* thereof, which is public. The discretion of the city authorities in determining what are proper and needed facilities for commerce, and on what part of the river bank, within her limits, they should be established, is manifestly not a

proper subject for judicial control or interference. Whatever incidental damage may result to proprietors from the exercise of these unquestionable corporate rights, it is *damnum absque injuria.*

These principles are elementary and established by numerous authorities 1 M., 187; 4 M., 10; 3 L., 563; 18 L., 278; 6 R., 349; 2 An., 538; 5 An., 34; 15 An., 657; 26 An., 357; 27 An., 17; 10 An., 171 and 523; 30 An., 190."

This line of authorities was again approved in the case of Pickles vs. Dry Dock Company, 38 An., 412, in which the plaintiff, who, under contract with the City of New Orleans, was operating a ferry across the river between New Orleans and Algiers, and who had been allotted a certain space on the river bank for his ferry landing, approaches, etc., brought suit against the defendant company, the riparian owner of the space so assigned, to compel the removal of certain structures that encroached on the space allotted to him. The defendant resisted the demand on the ground that, as it was the riparian owner of the property, it had a right to maintain its structures at that place. The Court, citing with approval the doctrine stated in Watson vs. Turnbull, *supra*, maintained the action and ordered the structures removed.

We take it, therefore, as settled beyond dispute, that the City of New Orleans, under its charter and under the general law, has the sole right to control and administer the use of the river banks within its corporate limits, and may erect thereon such buildings and other works as may be necessary for public utility and commerce. And that, in determining what are proper and needed facilities for commerce, the discretion of the city authorities is manifestly not a subject for judicial control.

It follows as a corrollary that the city may, in the

administration of this use, assign particular parts of the river front for the reception of particular kinds of commodities, or for the use of certain kinds of vessels, or to certain lines of vessels or railroads.

FENNER, Justice, in Leonard vs. Baton Rouge, 39 An., at

It may make such an assignment gratuitously or for a consideration.

Thus in the case of Pickles vs. Dry Dock Co., *supra*, the assignment was in accordance with a lease which the city had made to Pickles of a ferry privilege.

The public character of such use is not destroyed by the fact that it is farmed out to a particular individual if the use to which he puts it be public in character.

Heirs of Leonard vs. Baton Rouge, 39 Ann., 275, at 285.

So in the case of New Orleans vs. Louisiana Construction Company, 140th U. S., 654-664, it appeared that the city of New Orleans, through its counsel, had made a lease of a portion of the levee known as the Sugar Landing to a private person and his assigns for twenty-five years. Your Honors held that the lease showed that the lessee was to exercise a *quasi* public employment in the erection and maintenance of sugar sheds, and remarked:

"The city has not undertaken to alienate or sell the ground under the sheds, but has only leased it for a term of years, reverting at the end of that term, with the sheds built thereon, to the city for the benefit of the public. The ground has no more ceased to be devoted to the public use by the making of the lease and the erection of the sheds than if the city had itself built and managed the sheds for the promotion of commerce and the benefit of the city and its inhabitants.

* * * * * *

" Taking all of the provisions of the lease together, we are of the opinion that it in no way affected the character of the space in question as *locus publicus*."

It seems to be definitely settled, therefore, that, in pursuance of its right of control and administration of the use of the river bank within the city limits, it was perfectly competent for the city to assign gratuitously to the New Orleans Pacific Railway, or to lease to it, the use of the particular part of the river bank designated as the batture, in front of the park, for the purposes of its business; provided such use be public in character, and provided that there be no exception to the general law depriving the city of the administration of the use of this particular part of the river bank.

In Louisiana, at least, there can be no doubt but that the use specified in the ordinance was public in character. By the Constitution of Louisiana, Art. 244: " Railways heretofore constructed or that may hereafter be constructed are hereby declared public highways."

In the case of City vs. Railway Company, 27 An., 414, the Court said in relation to a grant of a similar nature:

" Nor was the grant a donation of public revenues to a private purpose. The grant is a license to a railroad company to use its property on the river bank for public purposes—to wit, to facilitate the transaction of its business with the public."

See, also,

New Orleans Pacific Ry. Co. vs. Nicholls, 30 An., 987.
Olcott vs. Supervisors, 16 Wall., 668.
Inhabitants vs. Railroad Co., 4 Mass., 564.
Brown vs. Duplessis, 14 La. Rep., 842-44.
Harrison vs. New Orleans Pacific Ry. Co., 34 An., 462.

In 135 N. Y., 253, it was held :

"To minister to the necessities of commerce by providing fit and proper places in its seaports where ships can be loaded and unloaded, with all proper facilities, is a public duty owing by the State, and through it by the municipality which governs and controls the Port; that, where a permanent pier and exclusive right to its use is a necessity of large steamship lines, without which its business cannot be properly transacted, the duty rests upon the State or the municipality to provide such accommodations, and where this duty has been imposed by the State upon the municipality, and it has undertaken its performance, all appropriate acts done by it in such performance are for a public purpose."

We submit that there could be no difference between a Park Commission, in respect to batture outside of the levee, under water at high water, and any other riparian owner. The Park Commission got by deed the riparian right from its grantor and no more. There is no law changing this riparian right, because it had been conveyed to Park Commissioners. The Park Commission being abolished, its duties as such were imposed on the city, but there was nothing taking away or denying the right of the city in its capacity as a municipality to administer the use of the batture. It would be very strange and exceptional in a commercial city which extends a long distance on the river above the park if the right of the city to use the river bank and batture outside of the levee in its capacity as a city should be taken away, because it was also charged with another duty of taking care of a park inside of Tchoupitoulas street. The park measures 2259 feet on this public road or Tchoupitoulas street and extends back to St. Charles avenue with diminished width. Its front is nearly half a mile in width.

If the city as a city is without power to administer the use of this batture outside of the public levee, she is in a very unhappy condition as an emporium of commerce. Such a right could only be denied under plain rules and plain principles, and we know of no legal reason why it should be denied.

Attention may be again directed to the fact that the ownership of the riparian proprietor at this point, whatever may be the name of such proprietor, is what is called in our Code, Art. 490, "imperfect ownership," being burdened with the servitude and right of administration, above described, for public purposes.

It should also be specially noted that the learned Court below, in recognizing our right to the use of this batture for the plainly public purposes recited in the lease, did say, "*without prejudice*, however, *to any rights* which the City of New Orleans as the successor of the late Park Commission which as having the administration of the Audubon Park vested in it by law, may have in limitation or control of the rights and grants of which is hereby confirmed springing out of the destination of the said Audubon Park as a public place." We fail to see what complaint the City of New Orleans can make in the presence of such a reservation.

It may be added that the lease of the batture in front of the park is not an alienation by the city, but simply amounts to an act of administration.

It is elementary in Louisiana that a lease is not a conveyance in the sense of alienation, and does not confer upon the lessee either the legal possession or any proprietary interest in the immovable.

In the case of Hoffman vs. Lorens, 18th Louisiana, page 73, the Court drew the distinction between the

jus in re of the usufructuary, and the personal right of a lessee. It declared that the right of the lessee is strictly personal, giving to the lessee only the use of the property, but conferring neither the legal possession nor any proprietary interest in it.

By Act No. 48 of 1871, Sec. 7, a limit of ten years was placed upon the power of the city to lease "wharves and landings," but this batture in front of the city park was neither a wharf nor a landing in any sense in which those terms are employed in the Act of 1871.

The phrase "wharves and landings" means legally what the city can properly sell the revenues of, as held in Lannon vs. New Orleans, 20 Wallace, 577, 582, and Ouachita vs. Aiken, 121 U. S., 444, 446. The Act of 1871 is quoted in the latter case.

This is common knowledge in New Orleans, and may be illustrated by reference to Flynn's "Digest" published in 1896, by the authority of the City Council.

In that Digest, page 1214, we find the last ordinance upon the subject providing for the wharf lease which began in 1891, and at page 1217, we find a description of the wharves and landings, the revenues of which were sold under this ordinance. They begin at Toledano street, about two miles below the park, and extend thence down to Piety street, in the Third District. When we come to ask what the "landings" are, we find by reference to Article 3303, beginning at the foot of page 1217, that they are a strip of land behind the wharves and between those wharves and a designated parallel line. Below what is known as the Coal Landings this strip is declared to extend from the wharves to the outer line of the Texas and Pacific Railroad track.

These landings are an adjunct and heavy freight is thus kept on terra firma.

The city has never undertaken to sell the revenues of any landing in front of the Upper City Park. There was no landing there in the sense in which she was authorized to make a lease of the wharves and landings by selling their revenues to the highest bidder.

It may again be noted that the City has received and kept $1,000 of our money devoted by Section 2 of the Ordinance No. 6938 to the improvement of the park, and undertakes to repudiate the lease without returning this money. This action is similar to that denounced in the case of New Orleans vs. Steamship Company, 20th Wallace, p. 395.

THIRD POINT.

We submit that the foregoing considerations dispose of this case in our favor; but, if it be necessary to go into the question of the performance of the resolutory conditions imposed upon the railway by the ordinances in question, we submit with great confidence that the railway company has complied with those conditions, and that from this point of view the decree of the lower Court ought to be affirmed.

It will be noticed by an inspection of the ordinances that in the first, No. 6695, A. S., the right of the rail-

way company, given by the Legislature in Act No. 14 of 1876, to establish and maintain in the City of New Orleans proper freight and passenger depots, and to construct wharves, piers, warehouses, yards, depots and stations, and to construct and maintain its said railroads, or any part of the same, and to have the right of way therefor across and *along or upon any street, highway*, turnpike or canal in the State of Louisiana which the course of said railroads may intersect, touch or cross (Transcript, pp. 46–54), is distinctly recognized; and the statement is made that it is for the interest of the City of New Orleans that the southern *terminus* of said railway shall be fixed and established within the city limits, and, after various recitals of the desires and then-existing plan of the railway company in regard to the line of the road, the preamble concludes as follows:

"Now, therefore, for the purpose of permanently securing to the City of New Orleans the advantages which will result from locating and maintaining the terminus of the said New Orleans and Pacific *within the city limits.*"

The exact location of the terminus was left to the desire and option of the railway company.

Proceeding now to Section 4 we find that the right of way, franchises and privileges herein granted to the New Orleans and Pacific Railway Company are granted only on condition and in consideration that the said grantee shall permanently establish the terminus of said road *within the city limits*, and maintain said terminus during the existence of the charter of said company, for which period said right of way and privileges shall last; and, should the said company at any time hereafter abandon its said road on the east side of the Mississippi River *and* its terminus within the

city limits, then this grant shall cease and terminate and be without further force and effect from the date of such abandonment. Then, after certain provisions as to method of construction, a further condition was added that said railway company should complete its road from the crossing of the Mississippi River at or near Baton Rouge to its terminus in this city within two years from the promulgation of this ordinance. This time limit would expire in November, 1882.

It should further be noticed in this ordinance, No. 6695, that by Section 5 the rights on Claiborne street apply only to a railroad for passenger purposes, it being plain that the point of this grant in Claiborne street was to get to a passenger station which might be established on Claiborne street near Canal, where there is a neutral ground of great width occupied by the Claiborne market.

The interest of the City of New Orleans, then, in the matter was that the southern terminus of said railroad should be fixed and established *within the city limits*, and the purpose of the ordinance, in so many words, was to permanently secure to the City of New Orleans the advantages that would result from locating and maintaining the terminus of the railway within the city limits. Just where that terminus was to be was left to the desire and option of the company.

The second ordinance, No. 6732, A. S., is not specially in question in this cause as to conditions, because neither of the repealing ordinances of which we complain undertakes to rescind the right on Thalia street itself. The ordinance No. 685 refers only to a lease of the batture in front of the Upper City Park, and the ordinance No. 1828, C. S., undertakes to rescind only rights on Claiborne street. But it may be

observed that No. 6732 makes an important construction of ordinance No. 6695, to which it is supplemental. It refers again to the terminus simply as being within the *city limits* (p. 56), and grants the rights mentioned on condition and in consideration that that said grantor shall permanently establish the terminus of said road *within the city limits*, and maintain the said terminus during the existence of the charter of said company, for which period said right of way and privileges shall last. And should the company at any time abandon its said road on the east side of the Mississippi River *and* its terminus within the city limits, then the grant was to cease and terminate. Certain paving was to be done only when the track should be laid, and the laying of this track was not to be done in any particular time ; and it was further provided that the railroad company should complete its road from the crossing of the Mississippi River, at or near Baton Rouge, to the terminus in this city within two years from the promulgation of this ordinance, which would be in December, 1882.

Coming now to the third ordinance No. 6938, A. S., we find a change of plan corresponding to the historical and topographical facts in the case.

There was no longer any present interest in a railway coming in from the west, crossing at or near Baton Rouge, and coming down thence on the east side of the river. The railway company had under its charter full power to build on either or both sides of the river (p. 54). The fact is recognized and the preamble recognizes the fact that it had acquired the railroad theretofore constructed on the west bank of the Mississippi River, between Bayou Goula and Westwego ; in other words, nearly all the way from New Orleans to

It should be noted, that up to the time of the adoption the ordinance of March 29th, 1881, No. 6938, we could only use Claiborne street for *passenger* trains, and Thalia street leading thence to the river for *freight* trains. Transcript, p. 56. But, in the change of plan, necessitated by the fact that the railroad came down the west bank of the Mississippi River, crossing into New Orleans at Thalia street, a change conceded to have been agreed to by the City (see appellant's brief, p. 30), in the last granting ordinance of March 29th, 1881 (Transcript, p. 59, Sec. 4), the terminal facilities to be established between Thalia and Terpsichore streets, on the river front, were plainly allowed to be used for *both* purposes; passengers, freight or any other matters proper in the transaction of the business of the Company. It is obvious from this that the intention of all parties was, that our terminus, in its most useful and inclusive sense and form, was to be established there. And it was established and connected with a crossing of the Mississippi River within the two years, and the fact fully recognized in the next Ordinance, No. 7946, Transcript, p. 61. And there it has been operated and maintained ever since.

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Baton Rouge. It was recognized that this was to be operated as a part of the through line to and from a terminus in New Orleans, and the *option* was still recognized in the railway company to designate a terminus between the new canal, Claiborne Canal and Carrollton avenue.

These recitals exhibit a change of plan and a recognition of that change.

The second section of the ordinance makes the lease of the batture in front of the Upper City Park in such a way that that place might have been selected and designated by the company as a terminus, having stations, depots, tracks, &c.

The fourth section does the same in regard to the property of the company itself, between Thalia street and Terpsichore street on the Mississippi River. The company is authorized, at its own expense, to erect and maintain there such ferry facilities, wharves, piers, warehouses, elevators, yards, tracks, depots, *stations*, sheds and other structures as shall be necessary and convenient for the transfer of cars, engines, passengers, and freight, and in the transaction of its business; in other words, terminals.

The company was to build 300 feet of new wharf at some other point above, between Terpsichore and Jackson streets, for the city, and this was done as part of the plan under the direction of the City Surveyor and to the satisfaction of the administrators, at an expense of $5,000.

After this change of plan it was undisputed that the terminal facilities of the road might be designated and established by the company on the river, between Thalia and Terpsichore streets, a place plainly more advantageous for commerce than would be a terminus in

the low and distant lands behind Claiborne street in the rear of the city.

By the sixth section the conditions of all the ordinances were rearranged, and the statement is distinctly made, not only as to the rights granted by this ordinance No. 6938, but as to those theretofore granted. It is declared that the

"right of way, franchises and privileges herein and *heretofore* granted to the New Orleans Pacific Railway Company are and *were* granted on condition and in consideration that the said grantee shall permanently establish *its terminus* within the city limits, and shall maintain such terminus during the existence of the charter of said company, for which period the said franchises, rights of way, grants and privileges shall last and continue; and should the said railway company at any time hereafter remove *its terminus* from within the city limits, then this grant shall cease and determine and be without force and effect from the date of such removal."

And after provisions with respect to construction work, in regard to which there is no question, the further condition is established that said railway company shall construct or control a line of road ready for use, from *a crossing* of the Mississippi River to its designated terminus in New Orleans, within two years from the promulgation of this ordinance, which would be in March, 1883.

It is apparent then, that the question of a railroad on the east bank of the Mississippi River from a point at or near Baton Rouge disappeared from view. It was for the interest of the public that there should not be unnecessary construction, and it is a matter of public history that another road was being built on the east side of the Mississippi River from Vicksburg and Baton Rouge, where it now exists. The conditions,

If we are to go outside of the language of the 4th Section of Ordinance 6695, and the modification in the 6th Section of Ordinance No. 6938, to hunt for technicalities, we may note that in Section 1 of latter ordinance, Transcript, top of p. 50, we are left to designate a terminus "east of Carrollton Avenue."

Now, Carrollton Avenue is very long and runs about *north* from the river to the Bayou St. John. On the right hand as you go out is the east, and that leaves the Company the choice of any suitable place between Carrollton Avenue, Canal street and the River, and the terminus mentioned in Ordinance 7946 is in this territory.

therefore, of all the rights are summed up in Section 6, page 60, of the transcript. The grantee is to permanently establish its terminus within the city limits, and maintain it, and is to construct or control a line of road ready for public use from a crossing of the Mississippi River to its designated terminus in New Orleans, within two years. At what point the river should be crossed also disappeared from consideration or condition. Still the point was to have a terminus in New Orleans connected with a road to Shreveport, and those conditions have been entirely fulfilled.

The work was done more rapidly than was required, and it is a matter of public history that the New Orleans Pacific Railway and its successor The Texas and Pacific Railway, running from that Thalia street terminus, in the City of New Orleans, on the east side of the Mississippi River, by transfer boats for passenger cars and freight cars, has brought an enormous commerce to the City of New Orleans. It has placed and kept New Orleans not only foremost in the cotton export of the world, but nearly foremost in the exporting grain from the West and from the Northwest.

The undisputed testimony of Mr. Wheelock shows fully that the terminus at Thalia street was established as early as March, 1882, on the property owned by the company between Thalia street and Terpsichore street (p. 25 *et seq.*), connected by transfer boat with the west side of the river at Gouldsboro', and from there to Baton Rouge Junction and Baton Rouge to Shreveport, which by the charter was the western terminus.

The further testimony of Wheelock and Strong (pp. 64 and 65) is undisputed in regard to the establishment of this designated terminus, its permanent character, its value assessed at $612,000, the construction of a large

number of tracks there on the east side of the Mississippi River at Thalia street, their connection to a crossing of the Mississippi River at Thalia street, the method by which passenger trains and freight trains are crossed by transfer boats to Gouldsboro' on the west bank, and removed thence to Baton Rouge Junction and Baton Rouge, where freight and passengers are crossed on another ferry, and from Baton Rouge Junction on to Shreveport and El Paso. All this was done prior to July, 1882, and the road has been operated so constructed and completed in 1881 and prior to July, 1882, has been operated ever since. It was out of repair somewhat at the moment of the receivership, but was repaired and restored to the company when the receivership terminated in 1888. The Texas and Pacific Railway Company went into actual possession about September, 1882. The testimony is full on this point, and there will be no contradiction, we imagine, in regard to these facts.

Mr. Harrod, as City Surveyor, testifying (p. 76) on behalf of the city, speaks of the works at Thalia street as the terminals or terminal facilities, and Mr. Brosnan, City Surveyor, informs us that he gave all the lines required under the ordinances, except between Louisiana avenue and Jackson streets on the river front, to which matter we will allude hereafter. That was the only disputed point (pp. 83, 84). And the city offered the map " P " showing this designated terminus (pp. 23-72). But this is by no means all. The administrators themselves acted unanimously in the matter, and on July 11th, 1882, and long within the time-limit required, adopted the ordinance No. 7946, A. S., which is declared to be supplemental to ordinance Nos. 6695, 6732 and 6938, in which they declare

that the New Orleans Pacific Railway Company had completed its road from Baton Rouge to New Orleans crossing at Thalia street, and established its terminus in the city limits at Thalia street and the levee, thus showing their entire satisfaction with the matter.

It would be impossible to have a plainer declaration and recognition upon this subject. It showed a railroad completed from Baton Rouge to New Orleans, crossing at Thalia street, and it shows the establishment of the terminus of the road in the city limits at Thalia street and the levee ; and it seems to us the height of injustice and the baldness of technicality to assume that the City of New Orleans by this action was leading a railroad company into a pitfall and would try to rise up four years after and assert that we have not exercised our right to establish a terminus in the proper place. It is elementary that conditions subsequent are not to be interpreted in any narrow or technical spirit. Conditions subsequent are not favored in law, because they tend to destroy estates. They are, therefore, easily subject to be modified or waived.

In Ludlow vs. New York and Harlem Railroad Company, 12th Barbour, 440, land was conveyed to the railway and the deed was to cease and be void unless the railroad was completed through the premises granted, on or before a certain day, and it was not so completed. The Court cited a number of cases to the effect that forfeiture for a breach of a condition subsequent is not favored in law ; and where the forfeiture is once waived the Court will not assist it. And the Court held that the plaintiff had by mere conduct waived the forfeiture, although the case was not nearly as strong against him as this case is against the City of New Orleans.

In Foster vs. Fitch, 36th Conn., 236, there was a condition subsequent that the railroad should be completed in a certain time, and it was not so completed. But this condition was held to have been waived by an act of the Legislature authorizing the railroad company to issue certain bonds.

In the case of the Sharon Iron Company vs. The City of Erie, 41st Penn. State Reports, 341, the conditions in a certain grant by the city corporation were held to be conditions subsequent, and to have been waived by the substitution of the right to make a blast furnace instead of the bloomery, although the blast furnace was never built.

As for the provision that "construction work within the city limits" should be done under the direction of the City Surveyor and completed to the satisfaction of the Administrator of Improvements and the Administrator of Commerce, there was no issue or dispute in the lower court concerning the work which has actually been done.

This work was all done on the terminal property of the railroad company on the river Mississippi between Thalia and Terpsichore streets. This property, some 800 feet front, had been acquired at great expense, and the terminals thus constructed on it cost at least $612,000, including the price of the land, which was about $175,000. This terminus was established under Section 4 of the Ordinance No. 6,938, A. S., upon our own property, and it might well be that no special direction of city officials would be required for a work of this kind; the construction work within the city limits being that in the streets in which the city was interested in the way of administration. But it was conceded that, so far as such direction of the City Surveyor was

required, it was had. The map marked T and P, concerning which Mr. Wheelock and Mr. Brosnan testified, exhibits lines given by Mr. Brosnan in Thalia street to the river and on Pilie street, which is the river front between Thalia and Terpsichore streets.

The testimony of Mr. Wheelock (p. 31) shows that the new wharf, 300 feet long, between Terpsichore and Jackson streets, to be built for the city as the consideration of the grant in Section 4 of the Ordinance No. 6938, A. S., and as part of that work, was built at an expense of $5,000, to the satisfaction and approval of the City Administrators and the City Surveyor, and was paid for upon the approval of Brosnan, Surveyor.

Mr. Brosnan's testimony shows that Mr. Wheelock, as president of the New Orleans Pacific, and Mr. Brosnan, as City Surveyor, were in constant conference over the matter of the work as far as it was done, and Mr. Brosnan testifies (p. 84) that he furnished the railway company all the lines and levels called for by the ordinances, except the disputed portion between Louisiana avenue and Jackson street, along the river front, which dispute was one of the principal causes of the trouble in this case. Mr. Brosnan declares (p. 84) that this was the *only disputed point.*

No question has ever been made of the completion of the work to the satisfaction of the Administrator of Improvements and the Administrator of Commerce so far as such work was done. That provision applied in reality to the completion of all the work contemplated by the ordinances, and that completion has been prevented by the city herself. When an obligee prevents the performance of a condition, it is considered as fulfilled (Rev. C. C., Art. 2040 [2038]). But so far as the work has been done, not only is the satisfaction

of these special administrators shown by the testimony of Wheelock, but the ordinance, No. 7946, is conclusive upon the question of the terminus being established on our riparian property at Thalia street and the river before July 11th, 1882. And in her paving suit, as late as 1888, which suit is still pending, the city claims that we have availed ourselves of our rights at the Thalia street terminus.

Under the City Charter of 1870 (Acts of 1870, p. 31), the City Council was composed of the Mayor and seven administrators, including the Administrator of Improvements and the Administrator of Commerce. This council, so composed, and including the officers whose satisfaction was to be indicated in some way, adopted without dissent this ordinance No. 7946, A. S., of July 11th, 1882, and beyond doubt expressed not only the satisfaction of these two administrators, but of all of them, with the method in which that terminus and transfer crossing at Thalia street had been established, and the two connected and extended to Baton Rouge.

The City Charter of 1870, under which these grants were made, and which was known as the Administration Charter, was repealed in June, 1882, the repeal to take effect in November, 1882 (Acts of 1882, pp. 14–37). In the summer and fall of 1882, as shown by the testimony of Wheelock and Brosnan, a controversy arose as to lines to be given by the city Surveyor for the continuance of the work under the ordinances. The City Surveyor refused to give lines on the river front from Louisiana avenue to Jackson street, under section 3 of ordinance No. 7938.

It seems plain that the railway company had a right under that section to extend its tracks from the batture

in front of the park along the river front; firstly, to connect with the Belt Railroad existing in Louisiana avenue, and then to connect at Jackson street with its tracks authorized by the two previous ordinances. The tracks so to be extended along the river front between Louisiana avenue and Jackson streets were *its* tracks—the tracks of the railway company—and there was a proviso that between Louisiana avenue and Jackson streets the trains of *said company* should only run between sunrise and sunset *on said track*.

The New Orleans Pacific thereupon commenced a suit of mandamus to obtain these lines, which the city defended, and that suit is still pending (p. 85). While this suit was pending the Council which had come into power under the new charter of 1882, passed the repealing ordinance No. 685, Council Series, repealing the batture lease, thus further undertaking to dismember our proposed system of tracks. And, in the meantime, the city neglected and refused to carry out the directions of the ordinance No. 7946, A. S., so that we might remove the Claiborne street market and lay the passenger track contemplated in Claiborne street and build a passenger station there. And this refusal still continues (p. 39). Our system of ordinances was thus torn to pieces by the hostile action of a new Council.

We have demonstrated above that the railway company fulfilled the conditions of these agreements so far as they were required to be fulfilled within any special time. It may be added that the language we have quoted from the 6th section of the ordinance No. 6938, A. S., and the ordinance No. 7946, would be in case of doubt the foundation for a decision in our favor.

We do not concede that any doubt should exist, but if there be any it is elementary in Louisiana that the

method *in which an agreement has been executed by both parties or by one with the expressed or implied assent of the other*, furnishes the rule for the interpretation of the agreement, and this is the textual provision of our Revised Civil Code, Art. 1956. This is not only good law, but common sense and equity.

Now, in this case the railway company proceeded to do all that was required to be done within the time limit of the ordinances, and its action received not only the implied but the expressed assent of the other party. And it would be very unjust to let the City of New Orleans now repudiate the ordinance No. 7946.

On this point we may refer to U. S. vs. Alabama, &c., R. R., 142 U. S., 615, 621, and the remarks of the Court through Mr. Justice BROWN and the cases there cited. The principle there laid down is quite in accord with the rule above cited from the Code of Louisiana.

The City of New Orleans by her refusals and by her acts has prevented us from doing more than we have done.

The maxim that equity imputes an intention to fulfill an obligation may be applied to the fulfillment in this case by the railway company, and the recognition of that fulfilment by the Ordinance No. 7946, A. S. As stated by Mr. Pomeroy, in his work on Equity Jurisprudence, Sect. 420, Vol. 1, the maxim means that, wherever a duty rests upon the individual, in the absence of all evidence to the contrary it shall be presumed that he intended to do right rather than wrong; to act conscientiously rather than with bad faith; to perform his duty rather than to violate it.

It would seem that such a maxim could be well applied where the railway company, as in this case, has

designated and established a terminus within the city limits and connected it with a crossing of the Mississippi River, so as to make railway connection with Baton Rouge and with Shreveport, and attained the object which the city had in view, and especially where the city herself, by the Ordinance No. 7946, has recognized such performance of a condition subsequent.

FOURTH POINT.

The record shows that all the rights sought to be taken away by the repealing ordinances in this case, were mortgaged to the complainant the Fidelity Insurance Trust and Safe Deposit Company to secure issues of bonds exceeding five millions of dollars. One of these mortgages was made July 31, 1880, and the other August 1st, 1884 (Transcript, pp. 8 and 63).

At the request of the city, in order to save expenses of the transcript it was stipulated at page 63 that these mortgages cover the rights given by the ordinances set forth in the bill of complaint, as therein stated, to secure issues exceeding five millions of dollars. We find, therefore, that this co-complainant the Fidelity Insurance, Trust and Safe Deposit Company has an interest as co-complainant and represents over five million dollars of bonds, and that the rights sought to be taken away by the repealing ordinances constitute a part of the security of these bonds and this mortgage. The mortgagee and bondholders thus acquired rights

that should not be disregarded and cannot be taken away except according to law. And on this subject we may again refer to the case of the Sharon Iron Company vs. the City of Erie, 41st Penn., 341.

FIFTH POINT.

The transcript shows action in the cause by both the Circuit and District Judges (pp. 20, 85). **They were both well acquainted with the history and geography involved in the controversy and the questions were carefully considered. A large presumption exists in favor of the correctness of their views.**

We can see no reason why the existing decree should be either reversed or disturbed but, if such reason does exist, the case should be remanded or otherwise disposed of without prejudice.

The decree below should be affirmed.

Respectfully submitted,

W. W. Howe,

John F. Dillon,

Of Counsel for Appellees.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 1.

CITY OF NEW ORLEANS, APPELLANT,

versus

THE TEXAS & PACIFIC RAILWAY COMPANY ET ALS., APPELLEES.

SUPPLEMENTAL MEMORANDA ON BEHALF OF APPELLEES.

I.

The first point in our original brief is, that under the law of Louisiana, the City of New Orleans could not itself lawfully repeal the Ordinances conferring rights on the Railway Company, and at page 24 of our original brief, we cited Articles No. 2045 (2040) and 2047 (2042), which are express to the effect that a dissolution of a contract where one of the parties is claimed to be in default, under the facts of this case, must be sued for, and the party in default may, according to circumstances, have a further time allowed by the Court for the performance of the condition, and that in case of dissolution the other party must restore what has been received.

Since that portion of the brief was prepared, the Supreme Court of Louisiana has rendered two opinions in which the general doctrine is again recognized. We refer to the cases of Railroad Company vs. Mayor, 48 La. An. 1102-1115, and State ex rel Railroad Company vs. City Engineer, 49 La. An. 678.

In the former case, 48 La. Annual, 1115, the City of Monroe had undertaken to repeal an ordinance granting rights to a railroad, and then to defend a suit on the strength of this repeal.

But although the ordinance was claimed to be *ultra vires* of the City, the Court said:

"We would not be justified in treating the ordinance as void. It must remain in force until decreed null *in proceedings to that end.* * * *

"Municipal corporations have no power to pass ordinances transferring a privilege or right for an expressed consideration and afterwards repeal them without granting to the transferees of the privilege or right the least hearing."

In the latter case, 49 La. An. 676, 679, the City of New Orleans had undertaken to repeal an ordinance which had granted certain franchises to a railroad company. The Court cited the case in the 48 La. An. 1115, and said:

"We must adhere to the principle laid down in that case. It applies here. It is an équitable principle applying even if a contract is null in its origin. *Multa fieri prohibentur quae si facta fuerint obtinent firmitatem.* If a contract is voidable proper steps must be taken to have its nullity declared."

Referring again to Gayden vs. Railroad, 39 La. Annual, 269, it may be noted that the point we make was made by counsel for the railroad in that case, as follows:

"The condition expressed in the grant that it should be

void if the road should not be completed within eighteen months was nothing but an express resolutory condition where the happening of the condition depended on the act of one of the parties, and (the grant) therefore, was not dissolved of right by the failure of the party to do, and could only be dissolved by a preliminary default followed by a suit to dissolve. Civil Code, Art. 2047."

There was verdict and judgment for plaintiff in the lower court, but the judgment was reversed and the suit dismissed. The Court pointed out that there was not even an allegation that the Railroad Company had been put in default (p. 272). The road was not built for about two years, although the contract provided, that should the railroad be not built within eighteen months from the date, then the contract shall be null and void; a stronger case, perhaps, against the railroad than can be claimed by appellant at the bar.

The opinion was delivered by the late Chief Justice BERMUDEZ, who was thoroughly versed in the law and jurisprudence of France, as well as of Louisiana. After speaking of the delay of some six months, on the part of the railroad, beyond the time agreed, the Court said:

"It does not however follow, that, on that account, the contract was *ipso facto* dissolved. Delsol, V. 3, No. 821.

"The plaintiff contends that the decision of the case is to be controlled by Article 2038, R. C. C., which provides that: 'When an obligation has been contracted on condition that an *event* shall happen within a limited time, the contract is considered as broken, when the time has expired without the event having taken place.'

"Plaintiff leaves out of view other provisions of law on the subject of resolutory conditions which bear upon this question.

"The Code defines the dissolving condition as that which, when accomplished, operates the revocation of the

obligation, placing matters in the same state as though the obligation had not existed. R. C. C. 2045.

"It further declares, that the obligation (condition) is implied in all commutative contracts, to take effect in case either of the parties *do not comply with his engagements*, in which case the contract *is not dissolved* of right. It leaves to the party complaining a right to sue for its dissolution with damages, or exact specific performance, according to circumstances. Indeed, the law wisely so provides, for the obvious reason that, although the obligor may apparently be in default, still he may not be so in reality, and for some good reason, such as *vis major*, obstruction by the obligee, actual or constructive extension of time, etc. This is the reason for which, according to circumstances, the Court may allow some further delay for compliance with the obligation. Delsol, Vol. 3, p. 483, No. 821.

"When the resolutory condition is an *event* not dependent on the will of either party, the contract is *dissolved of right;* but when that event is dependent on such will, the contract is not absolutely dissolved of right, and its dissolution must be judicially sought. R. C. C. 2047.

"Under the spirit and letter of the law, the resolutory condition may therefore consist in an event which does not depend, in any manner on the act of the parties, or it may have for object a fact dependent on the will of one of them.

"In the first case, it operates its effect of right, while in the second, the party complaining may exercise the right which results from the condition *only* by having it judicially ordered as a penal clause.

"The article relied on by plaintiff refers to an *event* not dependent on the parties; the others allude to acts dependent on the will of either party. With this distinction the case is clear. * * *

"The Articles of our Code are literal extracts from the French Code. It is in the sense which we have expressed that the provisions in the latter have been understood and expounded. R. C. C. 1912, 2047, 2563; C. N. 1183, 1184."

The ancient French law, as expounded by Pothier, and the Code Civil of France, and the French commentators are in accord on this special point. In addition to the citations made by Ch. Justice Bermudez, we may refer to Pothier on Obligations, Part 3, Chapter 7, Article 2; Evans Pothier, p. 490 (636); Domat, Cushing's Ed., Vol. 1, pp. 185, 193, 196; Larombiere on Obligations, Vol. 2, p. 290 *et seq.* At p. 352, the last named author, a distinguished French Judge, says:

"Let us pass on now to the exercise of the resolutory action. The contract is not dissolved *pleno jure;* the dissolution should be demanded in a court of justice, and a delay can be accorded to the defendant according to the circumstances. A commentary upon our Article (1184) is complicated a little with questions of procedure. As the resolutory action is an extreme action in reparation in damages, whether damages are allowed or not to the plaintiff, it is related under this aspect to the theory of putting in default. The creditor (meaning any party to the contract who makes a claim under it) should put his debtor (that is the other party) in default, at least when the question is one of simple delay.

* * * * *

"But it is not enough to have put the contravening party in default. The dissolution ought to be pronounced by a court of justice. The creditor is then obliged to prosecute an action."

* * * * *

The following provisions of the Louisiana Code may be referred to upon the subject of the default which is mentioned in the foregoing decisions and commentary:

"Art. 1911 (1905). The debtor may be put in default in three different ways; by the terms of the contract, by the act of the creditor, or by the operation of law.

"1. By the terms of the contract, when it specially pro-

vides that the party, failing to comply, shall be deemed to be in default by the mere act of his failure.

"2. By the act of the party, when at or after the time stipulated for the performance, he demands that it shall be carried into effect, which demand may be made, either by the commencement of a suit, by a demand in writing, by a protest made by a notary public, or by a verbal requisition made in the presence of two witnesses.

"3. By the operation of law. This takes place in cases where the breach of the contract alone is *by law* declared to be equivalent to a default. The law having declared that the neglect to return a thing loaned for use, at a stipulated time, or the application of it to another use than the one for which it was lent, puts it at the risk of the borrower; this, without any act of the lender, puts the borrower in default, and forms an example of this part of the rule.

"Art. 1912 (1906). The effects of being put in default are not only that, in contracts to give, the thing which is the object of the stipulation is at the risk of the person in default; but in the cases hereinafter provided for it is a prerequisite to the recovery of damages and of profits and fruits, or to the rescission of the contract.

"Art. 1926 (1920). On the breach of any obligation to do or not to do, the obligee is entitled either to damages, or, in cases which permit it, to a specific performance of the contract, at his option, or he may require *the dissolution of the contract*, and in all these cases damages may be given where they have accrued, according to the rules established in the following section."

In the case at the bar the railway was not put in default by "the terms of the contract," for there is no such language in the ordinances, and such language would have to be very clear and full, as shown by Mr. Marcadé in his commentary on Article 1184 of the Code Napoleon. He says, Vol. 4, p. 489:

"If the party, even in saying that the resolution will be operated *pleno jure*, has not taken care to add that there

shall be no need of any summons or citation, or, equivalent words, the resolution will result only from a summons to execute remaining unexecuted. If, on the contrary, one has been careful to say in the contract that the resolution will be operated by the sole fact of inexecution and without need of summons or any other formality, the resolution will be realized *pleno jure.*"

There cannot be two opinions as to the repealing Ordinance 1828, C. S. It was illegal on this ground alone. As for repealing Ordinance 685, C. S., concerning the lease of the Park Batture, it was equally illegal on this score, as well as for the other reasons we urge. The City never returned or offered to return the $1000 it had received, and has never sued to dissolve the lease. As held in State vs. City Engineer, 49 La. An. 679, above cited, "even if a contract is null in its origin, its disolutions must be sued for." And as a preliminary to such suit, there must be a restitution. Our Code in Articles already cited intends that on the dissolving of an agreement, the parties shall be restored to their original condition; Article 2044 (2040); and the further provision is made where want of power or capacity is alleged:

"Article 1793 (1787). If in a contract with an incapacitated person, or in a contract void for want of form, entered into with one for the benefit of such incapacitated person, any consideration be paid or given, and the contract be afterwards invalidated on account of such incapacity or want of form, the consideration so paid or given must be restored if it was applied to the necessary use or benefit of the incapacitated person."

Thus, in McCall vs. Henderson, 11 La. Annual, 209, 211, where a minor had purchased property without authority at law, his obligation to tender back the property, in a suit to rescind, is recognized. The *restitutio in integram* is a

plain doctrine of equity, as old as the classical jurists. And it has been repeatedly recognized by the Courts of equity. See Grimes vs. Sanders, 93 U. S. 62. In City of New Orleans vs. Steamship Co., 20 Wallace, 387, the City claimed that a lease of a wharf was *ultra vires*, pp. 391, 392, both of the City and its officers. This Court laid stress on the fact that the City had received and kept the rent, and yet proceeded to act as if the lease was null and had no existence at all.

Mr. Justice HUNT, in concurring, laid great stress on this fact as a ratification with knowledge, and cited abundant authority, p. 401. The Court said, at p. 396, that it might well be held "that the City was estopped from denying the validity of the lease by receiving payment of one of the notes."

The lesson of the case was that the City should have tendered back the rent and sued to annul.

II.

In our original brief and in the foregoing point we have treated the conditions of the grants made by the ordinances as resolutory or subsequent. The City of New Orleans now claims two of them to be suspensive or precedent.

This is a manifest error on the part of the City. It might be enough to refer to the case of Gayden vs. Railroad, above cited, 39 La. Annual, 269, where similar conditions were held to be resolutory or subsequent.

In Cornell vs. Hope Insurance Company, 3 Martin N. S., 223-226, it was noted that the suspensive condition is in

effect a condition precedent, and that the dissolving condition is something different.

The late Professor Dwight, of Columbia Law School, who passed his learned life in the study and teaching of these and other distinctions, says, in an article in Johnson's Cyclopedia, *verbo* "condition:"

"Conditions as to their form are either express or implied: as to their relation to the estate, they are either precedent or subsequent. A condition is said to be precedent when it precedes the *vesting* or enlarging of the estate. It is subsequent when the estate, *having vested*, its regular effect is to defeat it. The distinction does not depend upon any form of words, but upon the intent of the parties. It will be observed that the regular effect of a condition subsequent is to lead to a forfeiture. As the spirit of the law is opposed to forfeiture, it is governed by technical rules that would not be applied in case of a mere action upon a promise or covenant. Great care must be taken not to confound rules which appertain to the one subject with those which prevail in the other. It is an elementary rule that a condition subsequent does not affect the *nature* of the estate; it only qualifies it to this extent, that on the happening of the specified event it may be made to *terminate* before its natural expiration. Thus, an estate in fee, or for life, or for years, remains a member of its class, though it may be defeated by the happening of the event which is called a condition. It should also be stated that the happening of the prescribed event does not *of itself* defeat the estate. There must be an affirmative act on the part of the grantor, whereby he repossesses himself of his estates. This is technically called a 're-entry.' In well-drawn instruments a power of re-entry is expressly reserved."

He further gives an example of a condition subsequent which goes to defeat an estate, as where land is devised to a daughter, the estate to be defeated in case she should enter a convent.

And see United States vs. Repentigny, 5 Wall. 211, 254, 255, 267, 268, as to conditions subsequent and their enforcement to defeat a grant at common law.

Now, to compare this with the civil law we find that Larousse, Grand Dictionnaire Universelle, gives these definitions. (We translate):

"Condition suspensive: That which *suspends the executions of a disposition*, or of an obligation, *until* the realization of a future event (fait prévu).

"Condition resolutory: That which operates when it is accomplished, the *revocation* of the obligation or the *disposition*." (Disposition here means grant).

The Civil Code of Louisiana does not differ except in fullness from the French Code. It says:

"Art. 2021 (2016). Conditional obligations are such as are made to depend on an uncertain event. If the obligation is *not to take effect* until the event happen, it is a suspensive condition; if the obligation *takes effect immediately*, but is liable to be *defeated* when the event happens, it is then a resolutory condition.

"Art. 2024 (2019). The potestative condition is that which makes the execution of the agreement depend on an event which it is in the power of the one or the other of the contracting parties to bring about or to hinder.

"Art. 2025 (2020). A mixed condition is one that depends at the same time on the will of one of the parties and on the will of a third person, or on the will of one of the parties and also on a casual event.

"Art. 2026 (2021). Conditions are either express or implied. They are express when they appear in the contract; they are implied whenever they result from the operation of the law, from the nature of the contract, or from the *presumed intent of the parties*.

"Art. 2043 (2038). The obligation contracted on a suspensive condition is that which depends either on a future and uncertain event, or on an event which has actually taken place, without its being yet known to the parties.

"In the former case, the obligation *cannot be executed* till after the event; in the latter, the obligation has its effect from the day on which it was contracted, but it cannot be enforced until the event be known.

"Art. 2045 (2040). The dissolving (resolutory) condition is that which, when accomplished, operates the *revocation* of the obligation, placing matters in the same state as though the obligation had not existed.

"Art. 2046 (2041). A resolutory condition is implied in all commutative contracts, to take effect in case either of the parties do not comply *with his engagements;* in this case the contract is not dissolved of right; the party complaining of a breach of the contract may either sue for its dissolution with damages, or, if the circumstances in case permits, demand a specific performance.

"Art. 2047 (2042). In all cases the dissolution of a contract may be demanded by suit or by exception; and when the resolutory condition is an event not depending on the will of either party, the contract is dissolved of right; but, in other cases, *it must be sued for*, and the party in default may, according to circumstances, have a further time allowed for the performance of the condition."

The French commentators are full of illustrations of the difference between the suspensive and the resolutory or dissolving condition, but we do not know of one who contravenes our views on the subject.

Pothier is very clear. He shows that the suspensive condition suspends the obligation. It cannot take effect or vest anything until the condition is fulfilled. Evans Pothier, Vol. 1, p. 198: while resolutory conditions "are those which are added, not to suspend the obligation until their accomplishment, but to make it cease when they are are accomplished," p. 214. The former, then, are similar to conditions precedent, which delay or suspend the vesting of an estate until they happen. The latter are similar to

conditions subsequent which do not delay or suspend such vesting of the estate, but may defeat it after it has vested. Mr. Larombière, Vol. 2, p. 2, gives an illustration as follows:

"I sell you my house, and at the same time I stipulate that the sale shall be dissolved if the ship *Veloce* arrives from Smyrna. I promise to give you 1000 francs if a certain ship returns from America. The event that I anticipate forms a condition, in the former case, resolutory, in the latter, suspensive."

In other words, considering the 1000 francs as an estate, it will not vest until the ship returns from America. The effect of the agreement is suspended. The return of the ship must precede the vesting. In the other case the house will vest in the purchaser, but the subsequent condition, when it occurs, will defeat or dissolve the estate.

Now, we submit that the ordinances in our favor of 1880 and 1881 were grants *in presenti* and vested the rights thereby granted at once. Such is their plain language. In Schulenberg vs Harriman, 21 Wall. at p. 60, the grant of lands to the State of Wisconsin was held to be *in presenti* and to pass an immediate and present interest, under language no stronger, if as strong. And in that case the Court said further, p. 62, that the provision, that all lands remaining unsold after ten years should revert to the United States if the road be not then completed, was no more than a provision that the grant should be void if a *condition subsequent* be not performed, and cited the law from Sheppard's Touchstone as follows:

"If the words in the close or conclusion of a condition be thus: that the land shall return to the enfeoffer, etc., or that he shall take it again and turn it to his own profit,

In deciding whether a condition is suspensive or resolutory, a doubt is solved in favor of the latter, for the plain reason that is given by Mr. Larombière. He says:

"We interpret obscure and ambiguous clauses as forming a resolutory, rather than a suspensive, condition. In fact, contracts left to their natural force and to the ordinary dispositions of law, produce *immediate* results. * * * To contract, and then to remain in the *statu quo* of a suspensive condition is something so little in harmony with the natural effect of a contract, that one can admit it only on the evidence of complete proof. It is then to enter at once into the spirit of the law and into the intention of the parties when we *presume*, in case of doubt, *that a condition is resolutory rather than suspensive*." Vol. 2, p. 8, No. 8.

or *or that the land shall revert*, or that the feoffer shall *re-cipere* the land, these are either of them good words in a condition to give a *re*-entry as good as the word *re*-enter, and by these words the estate will be made conditional."

See also Grinnell vs. Railroad Company, 103 U. S. 739, 742:

In R. R. Land Co. vs. Courtright, 103 U. S. 310, the stringent terms imposed upon the Railway Company in the grant of lands by the State of Iowa were held to be conditions subsequent; this Court saying that: "the terms in which the right is reserved, by the act of the State, to resume the lands granted, imply what the previous language of the act declares, *that a present transfer was made, and not one dependent upon conditions to be previously performed*," p. 316.

And see R. R. Co. vs. Phelps, 137 U. S. 528; U. S. vs. Southern P. R. Co., 146 U. S. 570, and cases there cited by this Court.

Now, reading the ordinances here as grants; and such they are, on expressed considerations moving to the City; we find that they are all *in presenti*. The preambles each and all indicate an intention to give the Railroad Company a present right to lay tracks, and build similar works, in public places, and to operate them. Trans. pp. 54, 56 and 58. Then follow in each ordinance the grants themselves, in words whose meaning is not doubtful. The Company *is* authorized to lay its tracks, etc., p. 54; it *is* authorized to locate and construct tracks, switches, etc., in the streets named, p. 55; it *is* authorized to lay tracks, etc., on Thalia street, p. 56; it *is* authorized to locate and maintain a railroad along the western border of the Park, pp.

58-59; the right is conferred to, at once, establish the Thalia street terminals, foot of p. 59.

The recitals at page 58 show that the Company acquired the road from Bayou Goula down to a point opposite New Orleans, "as part of its through line," from Shreveport to New Orleans; see Charter at p. 50; and grants are made to get this important artery of commerce and object of taxation into the City with its terminals and its necessarily large taxable values.

All is in the present tense. Is it conceivable that such grants were made on suspensive conditions so that they should be hung up and ineffective until those conditions should be fulfilled? It is unthinkable. It is impossible. The theory is self-contradictory. Look at the last section of the last of the granting ordinances at page 60 of the transcript, which sums up the conditions, as the City reviewed the matter in March, 1881:

"Sec. 6. Be it further ordained, etc., That the right of way, franchises and privileges herein and *heretofore* granted to the New Orleans Pacific Railway Company, *are and were* granted on condition and in consideration that the said grantee shall permanently establish its terminus within the city limits, and shall maintain said terminus during the existence of the charter of said company, for which period the said franchises, rights of way, grants and privileges shall *last and continue;* and should the said railway company, at any time hereafter, remove its terminus from within the city limits, then this grant shall *cease and determine*, and be without force and effect from the date of such removal; and the further condition that the construction work within the city limits shall be executed under the direction and supervision of the city surveyor, and completed to the satisfaction of the administrator of improvements and the administrator of commerce; and the further

condition that said railway company *shall construct or control a line of road*, ready for public use, from a crossing of the Mississippi river to its designated terminus in this city, *within two years from the promulgation of this ordinance.*"

And see also Section 4 of first ordinance, at p. 55 of transcript.

We see at once that the rights *are and were* granted; that they are to *last and continue* as long as the terminus in the City shall be maintained; that if the terminus be removed from within the city limits then the grants shall *cease and determine;* that construction work shall be done in a certain way, and a line of road constructed or controlled within a certain time. If these conditions are suspensive so that the grants do not go into effect or vest until the conditions are fulfilled, how could we lay tracks under them or establish transfer facilities, or wharves, or terminals; and, how is it that grants made in the present tense are to last and continue for a certain period and then cease and determine, if they have never vested?

In one breath the City tells us that the grants do not go into effect; that they do not vest, because the conditions are suspensive; and in the next we are accused of not having done a quantity of railway building under grants that are said not to have vested or gone into effect.

The fact is, as Prof. Dwight remarks, that the distinction between conditions suspensive or precedent and resolutory or subsequent, "does not depend so much on any form of words as upon the intent of the parties." Can it be sanely supposed that a city, so anxious to attract a trunk line, would hang up its grants so that they could not take effect for an indefinite period; or that the company would accept

such grants with the prospect of being gravely told: "You must not build anything in these public places, because the grants have not yet vested; and, if you do not build, we will declare your rights forfeited?"

But passing from such general views to the special points made in appellants assignment and brief, we find that every condition is now conceded to be resolutory save two, which are propounded in this form:

1. The establishment by the railway of its terminus within the area bounded by the New Canal, Claiborne Canal and Carrollton avenue (*as to which there does not seem to be any time limit*); and

2. The construction or control of a line of railway from a crossing of the Mississippi River to its designated terminus within two years from March, 1881.

As to the first of these conditions, we deny the correctness of its language, as elsewhere stated at much length. The Section 6, above quoted, uses as to this matter only the phrase, "its terminus." The 4th Section of the former ordinance uses the phrase, "the terminus of said railway," and nothing more as to this matter. But passing on from this, what is a railway terminus? Is it an imaginary point in space? No. It is a station at the end of a railway; and a railway, like the one in question here, has at such a station depots, sheds, yards and tracks, some on its property, some on streets and other public places. The diagram put in and brought up by appellant, pp. 72, 73 of the transcript, shows the terminus established prior to July, 1882, and the tracks are laid in many of the streets intersecting

and adjacent to her property. The whole City here concerned is cut up into blocks and streets.

How could we establish a terminus without having a present and vested grant of right to lay tracks in streets and other public places, and do whatever else was necessary? If the grants were not *in presenti*, and the "estate" did not vest, we never could establish a terminus either where we did, and where the City, in 1882, said we did, nor where it now says we ought to have done. If the condition was, as now contended by the City, it is plainly subsequent and resolutory; because plainly the grants are not only couched in the present tense, but a present vesting is indispensable to enable us to comply with this condition.

As to the second of the only two conditions now claimed to be suspensive or precedent, the same reasons are conclusive against such a claim. How could we construct or control a line of railway from a crossing of the Mississippi River to our terminus, whether that terminus were to be at Thalia street and the Levee, where the City in 1882 said it had been established, or behind Claiborne street, where it now claims it ought to be? Only by laying tracks through and across streets and public places. If the grants under the ordinances did not vest *in presenti*, we could not do this, and the *reductio ad absurdum* follows at once. This condition is also plainly subsequent or resolutory.

III.

We called attention at p. 49 of our original brief to the point that the City of New Orleans was estopped by her own admissions, interpretation, conduct and ordinance from

claiming that our rights as dealt with in her repealing ordinances have been forfeited.

A municipal corporation may interpret and waive conditions; and may estop itself like other parties to a contract.

County of Randolph vs. Post, 93 U. S. 502, 513, and authorities there cited.

The construction which has been given by the parties themselves in such a case as this will solve a subsequent dispute, and afford a just guide to the Court. The rule of our Code, that where a doubt is raised as to the meaning of an agreement, "the construction put upon it by the manner in which it has been executed by both, or by one with the express or implied assent of the other, furnishes a rule for its interpretation," C. C. 1956 (1951), is, we suppose, universal.

In Dermott vs. Jones, 2 Wallace, 1, 9, this Court said, that when a party "has in good faith fulfilled, but not in the manner or not within the time prescribed by the contract, and the other party has *sanctioned* or accepted the work, he may recover in the common courts *indebitatus assumpsit.*"

In his article on conditions, already cited, Prof. Dwight states very concisely what is found in many decisions and text-books.

"In well drawn instruments a power of re-entry is expressly reserved.

"The rule is so rigidly adhered to that if a lease should prescribe that an estate of a tenant should on the happening of an event be null and void, a re-entry would still be necessary."

(That is, in the terminology of the civilians, the agreement would not be dissolved *pleno jure*).

And even if the conditions now claimed by the City to be suspensive or precedent were so (which we do not admit), *they have been substantially satisfied*, and this is sufficient.

"This rule leads to an important principle, that the right to take advantage of the forfeiture may be waived expressly or by implication, as where rent upon a lease is accepted with knowledge of the cause of forfeiture."

Forfeitures are not favored in law. Conditions precedent are satisfied by a substantial performance. Conditions subsequent are often waived, modified or declared satisfied by the party imposing them. Minor's Institutes, Vol. 2, 292-298.

Acts of recognition and confirmation are recognized in our Code, Article 2271 (2251) to Article 2274 (2254), and they may be express or tacit, and may result from writing or words, or action or silence. Culverhouse vs. Marx, 39 La. Annual, 809; Jouet vs. Mortimer, 29 *Id.* at p. 212. In the latter case the Court said, repeating what had been said in Landry vs. Connelly, 4 Robinson, 127-132:

"In the eighth volume of the Commentaries, under No. 491, Toulier mentions two sorts of ratifications, the second of which is: 'Celle par laquelle nous approuvons un contrat auquel nous avons concuru, ou auquel nous avons été appelés, mais qui était susceptible d'être attaqué pour des vices réels ou apparents, de nature à en faire prononcer la nullité ou rescision.' This last sort of ratification is that provided for in our Code, and in one, as well as the others, 'peut être faite expressement ou *tacitement*, verbalement, par écrit, ou par des *actes* qui manifestent notre volonté, parfois même par le *silence*.'

"Several instances of express and tacit ratification are found in our jurisprudence, in which this Court, in accordance with the principles recognized by Toulier, has uniformly decided that an act may be approved by implied or tacit ratification, though null and void *ab initio*." 10 Martin, 226; 7 La. An. 17; 4 Rob. R. 132.

See also Gayden vs. R. R., 39 La. An. 269; Thomas vs. New Orleans, 25 La. An. 660, 663.

The establishment of our great terminus and terminal facilities on our property, and also on and in streets and public places, assessed at $612,000, was known as well in New Orleans as the building of the New Library, or the Baltimore and Potomac terminals and tracks are known in Washington. The City administration knew it. It received from us as part of the work a new wharf that cost $5000. Outgoing and incoming freight and passengers were received there from March, 1882, and not elsewhere, in New Orleans. It was established and exists as a great terminal of about 1500 miles of railroad. When the ordinance of July 11th, 1882, No. 7946, as was adopted, it was at once an act of municipal legislation, of recognition, of confirmation, of interpretation, and, if need be, of waiver of any other theory as to the meaning of the words "its terminus," or "designated terminus," or "terminus of the railway." It was the same as to the "crossing of the Mississippi River," and the connection with Baton Rouge, and the connection of the terminus with the crossing of the River. Every one knew and felt in 1882 that it was better that the terminus should be designated and established by the Railway Company, on the river front, where ships could land, and where many thousands of cars that come and go would not have to cross the City to go west or to come in from the west. The cogent language of this Court in U. S. vs. Ala. R. R., 142 U. S., at p. 621, is much in point in this connection, on the effect of construction and interpretation given to a contract or grant by the authorities.

It is the City that has been in default in this case. She has neglected to select property to which to remove the

market from Claiborne street. She has refused us lines between Louisiana Avenue and Jackson street, thus crippling a well-planned system. By her ordinance of July 11th, 1882, on the one hand; and by her wrongful acts on the other, preventing us from completing the system, she is estopped. C. C. 2040 (2038).

Then came the repealing ordinance of 1884, Transcript, p. 8, and then the repealing ordinance of 1886, p. 7. Then in 1887 the City set policemen to prevent us doing even a small work at our terminals, p. 16, but retired from that contest, and the question is not before the Court. See agreement and order, p. 21. Most of these acts of neglect or wrong came, perhaps, from the sudden abolition of the City Government in the summer of 1882, and the substitution of a new charter, which brought in a new kind of people. We will not follow our learned opponent in his excursion outside of the record, and say what kind of people they proved to be. By their fruits in the record they may be partly known.

The equities of our case at the bar are great in every aspect. The conduct of the City since July, 1882, has been one series of neglect of its duty and violation of our rights. They are contract rights, and as to this we refer to the learned synopsis of doctrine and decision in Pearsall vs. Railroad, 161 U. S. at p. 663. See also Railroad vs. City of New Orleans, 46 La. An. 526, 529.

IV.

In its assignment of errors here, the City of New Orleans under the fifth point undertakes to raise a question which is not in the pleadings, was not discussed

in the court below, and is probably mooted here in this way in error. We refer to the allegation in regard to our wharves, etc., in front of our riparian property between Thalia and Terpsichore streets, under the 4th Section of Ordinance 6938, of March 29th, 1881. The City has never attempted to repeal this grant, it has never questioned its validity in any way, it has accepted a wharf we built for her in lieu of the former ruin at an expense of $5000 (Transcript, p. 31) ; and has collected taxes on the structures there built on an assessment of $612,000. The City is also still in Court in the suit of which her petitions are in evidence, Trans. p. 68, claiming that the Railway Company has availed herself of this grant and demanding a large sum for an alleged and disputed bill of paving.

The only reason for the testimony with regard to the terminals at Thalia street and the Levee was to show that the recitals of the Ordinance No. 7946, A. S., of July 11th, 1882, were *true;* in other words, that we had complied with the conditions of the Ordinances Nos. 6695, 6732 and 6938, by establishing and maintaining our terminus in the City limits and constructing and controlling a line ready for public use from a crossing of the Mississippi River to that terminus within two years. The facts in regard to these important terminals were also referred to as showing how the repealing ordinances were *injurious* as undertaking in two places to cut in pieces a system of tracks that was intelligent and in the public interest as affording facilities and lessening charges.

It would be very remarkable if, on this record and state of the case, this Honorable Court should feel called on to pass on the validity *vel non* of the 4th Section of Ordin-

ance 6938. And we think that the brief of the City shows that it does not insist on this part of the fifth assignment. The grant, it may be remarked in passing, is recognized by the Act printed in the Appendix.

V.

We note that the City proposes to refer the Court to an opinion in the case of Construction Company vs. Illinois Central R. R. Co., 49 La. An. 527. This opinion decided nothing. There are five Judges of our Supreme Court. One of them delivered an opinion. The Chief Justice concurred in the decree only. Another Justice concurred only in the decree, and gave some reasons which showed that he differed on some points with the author of the first opinion. The fourth dissented *in toto*, and the fifth concurred in this dissent. We have just as much right to say that the two Judges who dissented were right as the City has to say that the opinion to which the decree was appended was correct, perhaps a better right. On application for a rehearing the Court declared as follows:

"The District Judge maintained a plea of no cause of action and dismissed the plaintiff's suit, and they, having appealed, we revised his decree, a majority of the Justices entertaining the opinion that the petition disclosed a cause of action.

"The result of our decision is that the cause will be reinstated and remanded for trial according to law, and in the lower court it will have the same status that it had before this appeal was taken, the plea of no cause of action being omitted.

"We have decided no issue in the case. Those issues made as well as those which may be hereafter raised therein will be considered and determined therein by the District Judge, as they will be completely at large. But,

while expressing this view, we do not abandon or intend to modify the views which the majority of the Justices entertained originally, *i. e.*, that the plaintiff's petition discloses a cause of action."

So nothing was decided. But it may be interesting to note what the City, as *appellee*, contended for at p. 537, which is all in our favor in the case at the bar, and what Justice MILLER says at p. 555; and also the points for a rehearing at p. 528, and the reference at p. 530 to Act No. 70 of 1896, Sec. 2, p. 103. This statute of our General Assembly contains an express legislative recognition of the right of riparian proprietors to maintain for their exclusive use wharves established prior to the passage of the act under whatever authority constructed. We refer to it elsewhere.

VI.

The contention of the City in regard to a passenger depot on Claiborne street, in place of a market, as it now appears, is not easy to understand.

In the repealing Ordinance No. 1828, C. S., one of the two of which we complained, the rights on Claiborne street are sought to be repealed. The reasons, if such, they may be called, are recited, the "alien corporation," and so on, the non-compliance with "conditions," plainly resolutory, the delay for so doing having "elapsed;" and it is then declared that "it is necessary for the public good that Claiborne street between Common street and the Old Basin shall be used for steam and horse railway and depot purposes." Transcript, p. 7. That is just what we claim the right to do under the second section of the first ordinance, pp. 54-55, and in the same *locus*. In other words, the City is to take it from us and give it to somebody else, and

when we protest we are now told that it cannot give the right to anyone. We believe it to be elementary, that when a party has put his case on a specific ground he is not permitted to shift his position, and, as this Court has said, to "mend his hold." R. R. vs. McCarthy, 96 U. S. 258-267.

But in the answer the City tries to "mend its hold." It says that Claiborne street (which is nearly 200 feet wide), "through which it is purposed to pass a railroad track and erect a depot near Canal street (between Common and Canal streets), on what is known as the neutral ground, a space of ground dividing said Claiborne street, and which had been dedicated to public use; that same had been planted with trees and arranged for matters of public necessity for the health and salubrity of the city; that the original act granting *right of way* through said premises was *ultra vires*, null and void."

But even trying to mend its hold, the answer does not claim that to allow a passenger depot to be built on the neutral ground between Common and Canal streets is *ultra vires*. It could certainly be no more unlawful than a market house.

And now come the assignment of errors and the brief of the City, and ignore the statement in the repealing Ordinance 1828, and the limitations of the answer, and say that it is *ultra vires* to allow a *passenger depot* at this spot, an attempt to "mend its hold" a second time.

There is no force in this last contention, even it can be considered. The "neutral grounds" of our very wide streets are not roadways or streets, but wide spaces between what are two highways or streets. They are almost all filled

with street railroad or steam railroad tracks, and there are passenger depots in some of them, as on the neutral ground of Basin street at Canal street. There was formerly one across the neutral ground of St. Charles Avenue at Napoleon Avenue. Such structures can be made ornamental and comfortable. They are no more improper than a market. Brown vs. Duplessis, 14 La. Annual, 842; Pulley vs. Municipality, 18 La., at p. 284. Not one of the cases cited by appellee is in point.

Respectfully submitted,

W. W. HOWE,

J. F. DILLON,

Of Counsel for Appellee.

DECEMBER 30, 1897.

APPENDIX.

The following is the second section of the Act of 1896 of the General Assembly of Louisiana, No. 70, Session Laws, page 103. The Act places the Port of New Orleans under the charge of a Board of Commissioners;

"SEC. 2. Be it further enacted, etc., said Board of Commissioners shall have power to regulate the commerce and traffic of the Harbor of New Orleans in such manner as may in their judgment be best for its maintenance and development. They shall have and enjoy all the rights, powers and immunities incident to corporations. They shall be empowered, and it shall be their duty to take charge of and administer the public wharves of the Port of New Orleans; to construct new wharves where necessary; and to erect sheds thereon to protect merchandise in transit; to place and keep the wharves, sheds, levees and approaches in good condition; to maintain sufficient depth of water and to provide for lighting and policing such wharves and sheds; to defray said expenses they shall charge upon the shipping visiting the port, for the use of wharves, etc., of the port of New Orleans, not exceeding one cent per net register ton per 24 hours (commencing at midnight just preceding the arrival of the vessel) for the first six days, provided the minimum charge on seagoing vessels shall not be less than $5.00. Where sheds are provided by said Board of Commissioners, shipping using same shall pay an additional charge of ½ cent per net register ton for 24 hours (time to be calculated same as above), said charge, however, in any case not to exceed cost of construction, maintenance and management of said improvements, *provided that nothing in this Act shall apply to wharves owned by riparian proprietors, whether individuals, firms or corporations, and maintained and used by the owner or owners or their lessees.*"

No. 1.
2d Supp. Br. of Howard Dillon
for Appellees.

FILED.
JAN 3 1898
JAMES H. McKENNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

Filed Jan. 3, 1898.

No. 1.

CITY OF NEW ORLEANS, APPELLANT,

vs.

TEXAS AND PACIFIC RAILWAY COMPANY ET ALS., APPELLEES.

ADDITIONAL MEMORANDA FOR APPELLEES.

I.

That the grants here in question were made *in presenti*, and on conditions subsequent or resolutory and not precedent or suspensive, is obvious. The two questions here are of the illegality of the two repealing ordinances—685, C. S., and 1828, C. S.—which attempt to destroy the rights respectively granted and vested (*a*) on the batture in front of the park, and (*b*) in Claiborne street.

1. As to the rights on the batture, they must have vested *in presenti*, for the railway company accepted them (p. 25),

and paid two annual installments of rent for 1881–'2 and 1882–'3, and tendered a third for 1883–'4. How could it be paying rent and the city receiving and keeping it prior to the expiration of the two years' time limit, if the grants were not *in presenti* and the rights presently vested?

Again, by section 3 of ordinance 6938, A. S. (Transcript, p. 59), the right was given the railway to extend its tracks from this batture along the river front to Louisiana avenue, and thence down to Jackson street, there to connect with its tracks theretofore authorized to be constructed from Julia street up to Jackson street along the river front, thus making a line from the batture in front of the park down to our terminus at Thalia street on the river, and thence down to terminals of the Jackson railroad (now Illinois Central) and those of the Louisville and Nashville and Morgan or Southern Pacific systems. (See Harrod's map, brought up in original, "R., 4," and Transcript, pp. 76 and 77.) Why should we pay rent and the city receive it, and why should we set up the terminals at Thalia street and the river alongside of the other important terminals of other great lines, and do this long before the two years expired, and have the right to connect our tracks on the batture with these terminals, if the rights on the batture were not presently vested?

2. So as to rights in Claiborne street. Again, see Harrod's map offered by the city and which delineates the lines granted us (R., 4). Not only are the grants *in presenti* in their language (Transcript, pp. 54, 55, 56), but nearly a year before the time limit of two years could have expired the railway company was trying to establish a passenger station

on the neutral ground of the street near Canal street and get down a track, and on July 15, 1882, the city passed the ordinance 7946, A. S. (p. 61), to prepare the way for immediate action, which action was only delayed by the neglect of the city herself. (See Transcript, p. 31.)

How could all this be going on if we had no present grant and vested right to lay a track in Claiborne street for passenger purposes and move a city market which stood across our path?

3. As to both grants sought to be destroyed by the repealing ordinances, not only is the language of the 6th section (Transcript, p. 60) plainly *in presenti* ("are and were granted"), but the doing of certain things by the railway company is stated as a "consideration"—a kind of price to be paid on a credit of two years. If I sell a plantation in Louisiana, by a sale made in Louisiana, for $50,000, to be paid in two years, the estate vests at once in the vendee, and if the consideration be not paid at the end of the two years, I may bring a suit to dissolve the sale, to set aside the grant, and re-enter. We here find another reason for holding the conditions all subsequent and resolutory.

4. As to both grants, we may again refer to the ordinance 7946, A. S., of July 11, 1882, where the grants are referred to as made in the past and as having vested, and not as something to vest in the future. (Transcript, p. 61.)

When we consider all these facts and circumstances and those set forth in our other briefs, we may well recur to the language of the jurist Larombière already cited:

"To contract and then to remain in the *statu quo* of a "suspensive condition is something so little in harmony "with the natural effect of a contract that one can admit it "only on the evidence of complete proof. It is then to "enter at once into the spirit of the law and into the inten- "tion of the parties when we *presume*, in case of doubt, "*that a condition is resolutory rather than suspensive.*" (Vol. 2, p. 8, No. 8.)

And to this we may add his remark in the same connection, that in trying to find out what parties mean in this respect "we must not dwell too literally on the expressions "they have employed."

II.

The references made above to Mr. Harrod's testimony and the map of lines given us as shown by him in his sketch "R. 4" furnish a vivid explanation of why it was that on July 11, 1882, the city administration, by an ordinance unanimously adopted, held that we had complied with the conditions of the ordinances, had established our terminus in the city limits at Thalia street and the levee, and had connected it with a crossing of the Mississippi river at that point (Transcript, pp. 26, 33, 64, 65), so that our passenger and freight trains thus run from these extensive terminals within the city limits to Shreveport and El Paso. The testimony and map show a wise plan resulting from the fact that our road was built down on the west bank of the river, crossing to New Orleans at Thalia street, as contemplated by ordinance 6938, page 58. Our terminus was placed by us at Thalia street, on the river, alongside of the terminals of

three other trunk lines. Thousands of cars coming weekly from the West and going to the West could thus come into New Orleans and go out, and could also be exchanged with these three other trunk lines with the shortest trackage and the least expense in charges to the public, and with a *minimum of danger to life and property*—a danger sure to come if we drew them through the heart of the city to and from Claiborne street, a distance of twenty-four blocks. Add to this the close connection with the shipping of the world, with a maximum of speed and a minimum of cost and danger, and it may be easily seen why in July, 1882, before any time limit had expired, the city administration distinctly expressed its satisfaction with the designation and establishment of our terminus.

Under the ordinances 6695 and 6732, A. S., we could only use Claiborne street for *passenger* trains, and Thalia street leading thence to the river for *freight* trains (Transcript, p. 56). But in the change of plan, necessitated by the fact that the railroad came down the west bank of the Mississippi river, crossing into New Orleans at Thalia street, a change conceded to have been agreed to by the city (see Appellant's Brief, p. 30), in the last granting ordinance of March 29, 1881 (Transcript, p. 59, sec. 4), the terminal facilities to be established between Thalia and Terpsichore streets on the river front were plainly allowed to be used for *both* purposes—passengers, freight, or any other matters proper in the transaction of the business of the company. It would appear from this that the intention of all parties was that our terminus, in its most useful and inclusive sense and form, was to be established there, and it was established and connected with a crossing of the Mississippi

river within the two years, and the fact fully recognized in the next ordinance, No. 7946 (Transcript, p. 61), and there it has been operated and maintained ever since.

The constitution of Louisiana declares railroads to be public highways (article 244.) There could be nothing secret in these matters. The designation and establishment of our terminus and its recognition in July, 1882, were perfectly public and open to all men. The theory of conditions precedent and the idea that the grants never vested at all because the terminus was not placed somewhere else was never heard of until the answer was filed in this case in 1886. *Apices legis non lex.* It was plainly an afterthought, and courts do not like afterthoughts. And so little did the city value this quiddity that down to 1888, and now, she is in the State court judicially asserting and admitting that our rights did vest *in presenti* (see petitions at pp. 68–71 of Transcript), and that we accepted and availed of them.

III.

At page 2 of our original brief we cited the charter of the New Orleans Pacific Railway Company, a legislative act, No. 14 of 1876. By a power superior to that of the city and in modification of any restrictions on the powers of the city, it gave us special authority to run along and across any river in the State. In view of this special right and in regulation and arrangement under the general power of the city to administer the bank of the river in the interest of commerce and public highways of commerce, the lease

of the batture in front of the park was made. And the city, as riparian owner, also thus obtained an annual revenue to improve the park.

IV.

In its fourth assignment of errors the city claims that the repealing ordinance 1828, C. S, has made it legally impossible to build in Claiborne street. We fail to understand this idea. We assert that the repeal was illegal and inoperative for three reasons, at least; that the city could not repeal a grant for alleged happening of resolutory conditions or for nullities; that we had complied with those conditions, and that the city, by refusal of lines between Louisiana avenue and Jackson street and by neglect and refusal to select lots for the Claiborne market after July 11, 1882, had prevented the fulfillment of obligations as to the grants sought to be repealed. The city cannot take advantage of its own wrong, nor is the case one where a statute having been repealed *pendente lite* the courts will no longer consider some questions concerning it.

And we here repeat what we have already alluded to, that a condition is considered as fufilled when the obligee prevents its fulfillment (Rev. C. C., 2040 (2038)—a plain maxim of justice. How could we build under our grants in Claiborne street with a market-house cutting them in two and the city in default in not selecting lots to which we could move it? How could we lay tracks, &c., on the batture in front of the park when the necessary connection of them was illegally denied us by refusing lines on the river

front from Louisiana avenue to Jackson street, a gap of thirteen blocks? These questions answer themselves.

We print these supplemental remarks merely in aid of what we have already said in our other briefs and not, of course, as being all the points in our favor on these questions. We ask the kind attention of the Court to all our printed arguments.

Respectfully submitted.

W. W. HOWE,
J. F. DILLON,
For Appellees.

JANUARY 3, 1898.

No. 1.

Article 290 &c.

Office Supreme Court
FILED,
MAY 17 1898
JAMES H. McKENNEY
CLERK

Filed May 17, 1898.

SUPREME COURT OF THE UNITED STATES.

OCTOBER, 1897.

No. 1.

CITY OF NEW ORLEANS

versus

TEXAS & PACIFIC RAILWAY COMPANY ET ALS.

Article 290, of Constitution of Louisiana, in effect May 12, 1898.

"RIPARIAN RIGHTS."

"ART. 290. Riparian owners of property on navigable rivers, lakes, and streams within any city or town in this State having a population in excess of five thousand [redacted]s, shall have the right to erect and maintain on the batture or banks owned by them, such wharves, buildings, and improvements as may be required for the purposes of commerce and navigation, subject to the following conditions, and not otherwise, to-wit: Such owners shall first obtain the consent of the Council or other governing authority, and of the Board of Levee Commissioners within whose munic-

ipal or levee district jurisdiction such wharves, buildings and improvements are to be erected, and such consent having been obtained, shall erect the same in conformity to plans and specifications which shall have been first submitted to and approved by the engineer of such Council or other governing authority and when so erected such wharves, buildings and improvements shall be, and remain, subject to the administration and control of such Council, or other governing authority, with respect to their maintenance and to the fees and charges to be exacted for their use, by the public, whenever any fee or charge is authorized to be and is made; and shall be and remain subject to the control of such Board of Levee Commissioners, in so far as may be necessary for the maintenance and administration of the levees in its jurisdiction. The Council, or other governing authority, shall have the right to expropriate such wharves, buildings and improvements, whenever necessary for public purposes, upon reimbursing the owner the cost of construction, less such depreciation as may have resulted from time and decay; such reimbursement, however, in no case to exceed the actual market value of the property. Provided, that nothing in this article shall be construed as affecting the right of the State, or of any political subdivision thereof, or the several Boards of Levee Commissioners to appro-

priate, without compensation, such wharves, buildings and improvements, when necessary for levee purposes.

"The grants made by the City of New Orleans under the terms of Ordinance 11,765, Council Series, adopted January 14, 1896, authorizing the construction, use and maintenance of wharves, structures and improvements upon certain riparian property in the Sixth Municipal District, and other grants of the same nature made by the City of New Orleans to riparian owners with reference to their property, are recognized as necessary aids to the commerce of this State, and are hereby ratified and declared to be lawful, but shall in no event be construed as conferring greater privileges or rights than might be conferred under this article, or as releasing the riparian owners from the obligations herein imposed, or which may have been imposed, upon or assumed by such riparian owners by contract, municipal ordinance or otherwise."

The foregoing ratifies the grant made by §4 of Ordinance 6938, A. S. Transcript, p. 59.

Respectfully submitted,

W. W. HOWE,

May 13, 1898. *Of Counsel.*

NEW ORLEANS *v.* TEXAS AND PACIFIC RAILWAY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 1. Argued January 3, 4, 1898. — Decided May 31, 1898.

Where an undertaking on one side is in terms a condition to the stipulation on the other, that is, where the contract provides for the performance of some act, or the happening of some event, and the obligations of the contract are made to depend on such performance or happening, the conditions are conditions precedent; but when the act of one is not necessary to the act of the other, and the loss and inconvenience can be compensated in damages, performance of the one is not a condition precedent to the performance of the other.

It being shown by the record that the railway terminus from which the extension along Claiborne street was to be made was never constructed, and that the crossing from Westwego to the land in front of the park was also never established, but, on the contrary, that the company extended its road down the river to Gouldsboro, where it made its main crossing, the right to the extension and the right to the use of the batture no longer obtains.

The suspensive condition, by which the rights of the company under the original ordinance were held in abeyance, operates also upon the lease, and the mere payment of rent did not change the nature of the suspensive condition, or work an estoppel.

Statement of the Case.

The ends of justice will be best subserved by not passing upon the third assignment of error, but the rights of both parties in relation thereto may be left open for further consideration in the court below.

THE New Orleans Pacific Railway Company became duly incorporated under the general laws of the State of Louisiana on June 29, 1875. By Article I, of its charter, it was given corporate existence for the term twenty-five years from that date. By Article III it was empowered among other things: "To lay, construct, lease, own, and use a railroad with one or more tracks and suitable turntables upon such course or route as may be deemed by a majority of the directors of said company most expedient, beginning at a point on the Mississippi River at New Orleans, or between New Orleans and the parish of Iberville, on the right bank of the Mississippi, and Baton Rouge on the left bank, or from New Orleans or Berwick's Bay via Vermilionville, in the parish of Lafayette, and Opelousas, in the parish of St. Landry, or from any of said points, or from any point within the limits of this State, and running thence toward and to the city of Shreveport, or the city of Marshall or Dallas, in the State of Texas, in such direction and route or routes as said company shall fix, and with such connecting branches in the State of Louisiana as may be deemed proper; to locate, construct, lease, own, maintain and use such branch railroads and tracks as the majority of the directors of said company may from time to time deem proper and expedient and for the interest of said company to own and to use, and lease, with the right to connect their main line with any other line or lines in other States, which shall authorize the exercise of said privilege within their limits; to establish and maintain in the city of New Orleans proper freight and passenger depots, and to connect them by tracks and ferries with the left bank of the Mississippi River, at such point or points as may be deemed most convenient for the public interest, and to use in such ferries, steamboats and other vessels, and for the purposes of such depots, tracks and ferries to acquire property by expropriation; to acquire, construct, maintain and use suitable wharves, piers, warehouses, yards, steamboats, harbors, depots, stations and other

works and appurtenances connected with and incidental to said railway and its connections, and to run and manage the same as the directors of the said company may deem to be most expedient and to the welfare of said corporation; to construct and maintain its said railroads, or any part of the same, and to have the right of way therefor across or along or upon any waters, water courses, river, lake, bay, inlet, street, highway, turnpike or canal within the State of Louisiana which the course of said railways may intersect, touch or cross, provided that said company shall preserve any watercourse, street, highway, turnpike or canal which its railways may so pass upon, along or intersect, touch or cross, so as not to impair its usefulness to the public unnecessarily; to obtain by grant or otherwise from any parish, city or village within the State any rights, privileges or franchises that any of said parishes, cities or villages may choose to grant in reference to the construction, maintenance, management and use of the railroads of said company, its depots, cars, locomotives and its business within the limits of such or any of said parishes, cities and villages; to purchase or lease from any railroad company or corporation, at any authorized sale, any railroad and the charter, franchises, property and appurtenances thereof and to maintain and use the same as a part of the property of said company."

On February 19, 1876, the General Assembly of the State of Louisiana passed Act No. 14 of 1876, to confirm said charter of the railway company, with amendments thereto, which among other things declared: "That the term of existence of the said New Orleans Pacific Railway Company shall be so extended that said company by its name and under the aforesaid mentioned articles of incorporation, shall have perpetual succession and that Shreveport in Louisiana shall be the northwestern terminus of said New Orleans Pacific Railway Company, and that the main line shall be completed to Shreveport before any branches shall be constructed."

The City Council of New Orleans on November 9, 1880, adopted Ordinance No. 6695, entitled "An ordinance granting to the New Orleans Pacific Railway Company or its

assigns, the right to establish its terminus within the city limits, and to construct, maintain and operate a railroad to and from such terminus with one extension for passenger purposes and another one for freight purposes into and through certain streets and places in the city of New Orleans."

This ordinance read:

"Whereas, the New Orleans Pacific Railway Company, a corporation organized and existing under Louisiana state laws, is vested with authority under an act approved February 19, 1876, as follows, to wit: 'To locate, construct, lease, own and use a railroad, with one or more tracks and suitable turnouts, of such gauge and construction and upon such a course or route as may be deemed by a majority of the directors of said company most expedient,' and to and between the points and places mentioned and implied in said act, and is hereby authorized 'to establish and maintain in the city of New Orleans proper freight and passenger depots,' and to construct wharves, piers, warehouses, yards, depots and stations; and to 'construct and maintain its said railroads or any part of the same, and to have the right of way therefor across and along and upon any street, highway, turnpike or canal in the State of Louisiana which the course of said railways may intersect, touch or cross. Provided the said company shall preserve any street, highway, turnpike or canal which its said railways may so pass upon, along or intersect, touch or cross, so as not to impair its usefulness to the public unnecessarily;' and,

"Whereas it is for the interest of the city of New Orleans that the southern terminus of said railroad shall be fixed and established within the city limits; and,

"Whereas the said New Orleans Pacific Railway Company is desirous of constructing its line of road on the east bank of the Mississippi, from a crossing near Baton Rouge to some point in the city of New Orleans, between the new canal and Melpomene street, and to establish its terminus at such point, on condition that the city shall grant to the company the right to extend its tracks from such terminus into and through Claiborne street to Canal street, for passenger purposes; and

shall also grant the right to extend its tracks from such terminus north of Claiborne street by the most convenient and practicable route through the public streets to the river front for freight purposes, with the right to operate the same by steam or otherwise, as is now done on the Belt railroad on St. Joseph street, and on the levees by other railroad companies in the city of New Orleans.

"Now, therefore, for the purpose of permanently securing to the city of New Orleans the advantages that will result from locating and maintaining the terminus of the said New Orleans Pacific Railway within the city limits:

"SECTION 1. Be it ordained by the Council of the City of New Orleans, That the New Orleans Pacific Railway Company be, and it is hereby, authorized and empowered to locate, construct and maintain a railroad, with all necessary tracks, switches, turnouts, sidings and structures of every kind convenient and useful and appurtenant to said railroad, upon lines and levels to be furnished by the city surveyor, to and from such point as shall be selected by such company as its terminus, between the new canal, Claiborne canal and Carrollton avenue, with the right to establish and maintain at such point necessary depots, shops, yards, warehouses and other structures convenient and useful for the transaction of its business, and to operate the same by steam or otherwise for the transportation of freight and passengers within the city limits.

"SEC. 2. Be it further ordained, That the said New Orleans Pacific Railway Company, or its assigns, be and they are hereby authorized and empowered to locate, construct and maintain an extension of its railroad, with all necessary tracks, switches, turnouts, sidings and structures of every kind convenient and useful and appurtenant to said railroad, upon lines and levels to be furnished by the city surveyor, into and through Claiborne street to Canal street, with the right to construct a passenger depot at or near the intersection of Claiborne street with Canal street; and to operate the same by steam or otherwise for the transportation of passengers; Provided, That should it become necessary for the building of

depot or laying of tracks to remove the Claiborne market, then the said New Orleans Pacific Railway Company obligate themselves to rebuild the same at their own expense on such lots to be purchased by the company as the city shall designate. The said market to be rebuilt under the supervision and instructions of the administrator of waterworks and public buildings.

"SEC. 3. Be it further ordained, That the said New Orleans Pacific Railway Company, or its assigns, be and they are hereby, authorized and empowered to locate, construct and maintain an extension of its railroad, with all necessary tracks, switches, turnouts, sidings and structures of every kind, convenient and useful and appurtenant to said railroad upon lines and levels to be furnished by the city surveyor, across Claiborne canal into and through such street as may hereafter be lawfully selected to the river front, with the right to extend its tracks through Front street, Water and Jackson streets, connecting with the depots of the Louisville and Nashville Railroad Company, Morgan's Louisiana and Texas Railroad, and the Chicago, St. Louis and New Orleans Railroad, and to operate the same by steam or otherwise for the transportation of cotton, tobacco, grain, merchandise and other freight; or the said company may purchase, lease, control, maintain and operate by steam or otherwise any railway or railway tracks now existing in the streets of the city of New Orleans.

"SEC. 4. Be it further ordained, That the right of way, franchises and privileges herein granted to the New Orleans Pacific Railway Company are granted only on condition and in consideration that the said grantee shall permanently establish the terminus of said road within the city limits and maintain said terminus during the existence of the charter of said company, for which period said right of way privileges shall last, and should the said company at any time hereafter abandon its said road on the east side of the Mississippi River and its terminus within the city limits, then this grant shall cease and terminate, and be without force and effect from the date of such abandonment, and the further condition that all construction work within the city limits shall be executed under

the direction and supervision of the city surveyor and completed to the satisfaction of the administrator of improvements and the administrator of commerce; and it is still further made a condition of this grant that said railway company shall complete its road from the crossing of the Mississippi River, at or near Baton Rouge, to its terminus in this city within two years from the promulgation of this ordinance.

"SEC. 5. Be it further ordained, That the rights herein granted on Claiborne street shall apply only to a railroad for passenger purposes; that the rights to be granted from north of the Claiborne canal to the river front and hereby granted along the river front and in parallel streets, shall apply to a railroad for freight purposes only, and shall not be used as a thoroughfare for the transportation of passengers without consent of this council."

On December 3, 1880, the following ordinance, numbered 6732, was adopted:

"Whereas, on the ninth day of November, 1880, the Ordinance No. 6695 (administration series) was duly adopted, granting to the New Orleans Pacific Railway Company, or its assigns, the right to establish its terminus within the city limits, and to construct, maintain and operate a railroad to and from such terminus; with one extension for passenger purposes and another for freight purposes, into and through certain streets and places in the city of New Orleans; and it was contemplated by said ordinance that a street should be duly selected whereby the said company should have its rights recognized to lay a track from Claiborne street to the river front through a street to be selected; now, therefore,

"SECTION 1. Be it ordained by the City Council of the City of New Orleans, That the New Orleans Pacific Railway Company, or its assigns, be, and it and they are hereby authorized and empowered to locate, construct and maintain an extension of its railroad, with all necessary tracks, switches, turnouts, sidings and structures of every kind, convenient and useful and appurtenant to said railroad, upon lines and levels to be furnished by the city surveyor across Claiborne canal, into and through Thalia street, to the river

front, and to operate the same by steam or otherwise for the transportation of cotton, tobacco, grain, merchandise and other freight; or the said company may purchase, lease, control, maintain and operate, by steam or otherwise, any railway or railway tracks now existing in the streets of the city of New Orleans; provided, that there shall be but one track laid on Thalia street, from Claiborne to Water street.

"SEC. 2. Be it further ordained, That the right of way, franchises and privileges herein granted to the New Orleans Pacific Railway Company are granted only on condition and in consideration that the said grantees shall permanently establish the terminus of said road within the city limits, and to maintain said terminus during the existence of the charter of said company, for which period said right of way and privileges shall last; and should the said company at any time hereafter abandon its said road on the east side of the Mississippi River and its terminus within the city limits, then this grant shall cease and terminate and be without force or effect from the date of such abandonment; and upon the further condition that the said company, at the time of laying their track upon Thalia street, shall pave said street, from Pilie street to Rampart street, including all intersections of said Thalia street, with blocks of the best hard Boston granite, oblong in shape, not less than eleven inches and not more than fourteen inches in width, and not less than sixteen inches nor more than twenty-four inches in length, and from nine to ten inches in thickness; they shall be well quarried, having parallel sides and ends, and the upper side free from lumps. The blocks adjoining the gutterstones shall be cut at an angle of forty-five degrees with the sides, so as to be laid diagonally, and said pavement shall extend from curb to curb; and the said company shall at the time of laying their track pave with round or cobblestone pavement, laying with gutterstones the gutters of said street, from the end of the block paving at Rampart street to Claiborne street, with the privilege of using for the pavement the cobblestones removed from that part of the street to be paved with square block — the rails to be laid in the pavement so that the top of the rails shall be flush with the

surface of the pavement; and upon the further condition that said railway company shall at all times keep said pavement from curb to curb in repair; and the further condition that all construction work within the city limits shall be executed under the direction and supervision of the city surveyor and completed to the satisfaction of the administrator of improvements and the administrator of commerce; and it is still further made a condition of this grant that said railway company shall complete its road from the crossing of the Mississippi River, at or near Baton Rouge, to the terminus in this city, within two years from the promulgation of this ordinance.

"SEC. 3. Be it further ordained, That upon the failure of said company to comply within three days with any notice of the department of improvements to repair any portion of the street or streets through which said company shall lay its tracks, they shall be fined twenty-five dollars for each and every day they fail to comply with said notice; said fine to be recoverable before any court of competent jurisdiction."

In 1881 the New Orleans Pacific Railway Company purchased a railroad already constructed by the New Orleans, Mobile and Texas Railroad Company on the west bank of the Mississippi River, extending from Bayou Goula, a point near Baton Rouge on the west bank, to Westwego, also on the west bank, and just opposite New Orleans. Subsequently on March 29, 1881, the city council passed an ordinance, No. 6938, as follows:

"Whereas the New Orleans Pacific Railway Company has purchased the road heretofore constructed under the charter of the New Orleans, Mobile and Texas Railroad Company, on the west bank of the Mississippi River, between Bayou Goula and Westwego, and with a view to maintaining and operating the said road in connection with and as a part of its through line to and from its terminus in New Orleans, designated in section 1 of Ordinance No. 6695, Administration Series, passed on the ninth day of November, 1880; such line to cross the Mississippi River from a point at or near Westwego to a point on the east bank of the river in front of the Upper City Park, late Foucher property; thence to extend by the best and most

practicable route to the designated terminus, between the new canal, Claiborne canal and Carrollton avenue:

"Now, therefore, for the purpose of securing to the city of New Orleans the advantages that will result from locating and permanently maintaining the terminus of the New Orleans Pacific Railway within the limits of the city of New Orleans, as hereinabove recited:

"SECTION 1. Be it ordained by the Council of the City of New Orleans, That the New Orleans Pacific Railway Company, or its assigns, be, and are hereby, authorized and empowered to locate and maintain a railroad with all necessary tracks, switches, turnouts, sidings and structures of every kind convenient, useful and appurtenant to said railroad, from such point on the river front as its crossings from Westwego shall be located at in the vicinity of the Upper City Park, along the western border of the said city park, and from thence by the best and most practicable route to its designated terminus east of Carrollton avenue.

"SEC. 2. Be it further ordained, etc., That the city of New Orleans agrees to lease unto the New Orleans Pacific Railway Company, its successors and assigns, for the period of ninety-nine years, and at the price of five hundred dollars per annum, payable annually in advance, all that strip or parcel of ground on the river front of said Upper City Park, south of Tchoupitoulas street, or south of an extension of Tchoupitoulas street, in a westwardly direction, and between a prolongation of the east and west boundary lines of said park to the river, with all the batture formed thereon, or which may form during the term of said lease, with the right to establish and maintain upon said grounds such ferry facilities, wharves, piers, warehouses, yards, tracks, depots, stations, sheds, elevators and other structures as shall be necessary and convenient for the transfer of cars, engines, passengers and freight, and in the transaction of its business. No vessel shall occupy or lie at such wharves without the consent of said company, its successors or assigns, and all vessels lying at or using said wharves with such consent, shall be exempt from the payment of levee or wharf dues to the city of New Orleans; the proceeds of such lease

shall be applied by the city to the improvement of said park.

"SEC. 3. Be it further ordained, etc., That the said New Orleans Pacific Railway Company, its successors and assigns, shall have the right to extend its tracks from the said ground so leased between the Upper City Park and the river front, easterly along said river front to connect with the Belt road at Louisiana avenue, and to connect at Jackson street with tracks heretofore authorized to be constructed between Jackson and Julia streets by section 3 of Ordinance 6695, Administration Series, adopted November 9, 1880, and by Ordinance No. 6732, same series, adopted December 3, 1880, provided that between Louisiana avenue and Jackson street the trains of said company shall be run only between sunset and sunrise on said track, except in case of emergency and necessity beyond the reasonable control of the company.

"SEC. 4. Be it further ordained, etc., That the said New Orleans Pacific Railway Company, its successors and assigns, shall have the right, and the same is hereby conferred for the term of its charter and from and after the expiration of the existing lease of the city wharves, to enclose and occupy for its purposes and uses, that portion of the levee, batture and wharf in the city of New Orleans in front of the riparian property, acquired or to be acquired, between Thalia and Terpsichore streets, and to erect and maintain thereon at its own expense such ferry facilities, wharves, piers, warehouses, elevators, yards, tracks, depots, stations, sheds and other structures as shall be necessary and convenient for the transfer of cars, engines, passengers and freight, and in the transaction of its business. No vessel shall occupy or lie at such wharves without the consent of said company or its successors or assigns, or discharge or receive cargo thereat, and all vessels lying at or using said wharves by such consent and on the business of the company shall be exempt from the payment of levee or wharf dues to the city of New Orleans.

"Said wharves and other structures shall be lighted and policed by said company at its own expense.

"Any vessel lying at these wharves with the consent of the

company, but not on its business, or not for the purpose of discharging or receiving freight or passengers to or from said company as a carrier, shall be liable to the city for usual wharf or levee dues.

"Any vessel using said wharf to receive any freight not coming to or going from said company as a carrier shall pay usual wharfage dues to the city.

"In consideration of the permission herein given the company will build three hundred feet of new wharf at such point between Terpsichore and Jackson streets, for the city, as the administration of commerce may indicate, and will pave Pilie street between Thalia and Terpsichore streets, and Terpsichore street between Pilie and Front with square blocks of granite or with blocks of compressed asphalt, and keep the same in good order.

"The rights conferred by this section shall not be held to interfere with the rights of the city to police any part of the river front.

"SEC. 5. Be it further ordained, etc., That the mayor be, and he is hereby, authorized and directed to enter into a proper notarial contract of lease for the purpose of carrying out the provisions of the second section of this ordinance.

"SEC. 6. Be it further ordained, etc., That the right of way, franchises and privileges herein and heretofore granted to the New Orleans Pacific Railway Company are and were granted on condition and in consideration that the said grantee shall permanently establish its terminus within the city limits, and shall maintain said terminus during the existence of the charter of said company, for which period the said franchises, rights of way, grants and privileges shall last and continue; and should the said railway company, at any time hereafter, remove its terminus from within the city limits, then this grant shall cease and terminate and be without force and effect from the date of such removal; and the further condition that the construction work within the city limits shall be executed under the direction and supervision of the city surveyor, and completed to the satisfaction of the administrator of public improvements and the administrator of commerce; and the

further condition that said railway company shall construct or control a line of road, ready for public use, from a crossing of the Mississippi River to its designated terminus in this city, within two years from the promulgation of this ordinance."

The New Orleans Pacific Railway Company, on June 20, 1881, entered into a written agreement with the Texas and Pacific Railway Company, a corporation organized under the laws of the United States, by the terms whereof the New Orleans Pacific Railway Company consolidated itself with the Texas and Pacific Railway Company on the terms and conditions specified in the agreement, "by granting, bargaining, selling," etc., "unto the Texas and Pacific Railway Company all the franchises, corporate rights or privileges of the New Orleans Pacific Railway Company, together with its track, roadbed, buildings, rolling stock, engineer's tools, bonds, stocks, grants, privileges, property (real and personal) and every right, title and interest in and to any franchises or property, real or personal, and all rights of every name and kind in which the New Orleans Pacific Railway Company had any right, privilege or interest, situated and being in the State of Louisiana or in the State of Texas, or elsewhere, it being declared by the agreement that the object of the agreement was to so merge the rights, powers and privileges of the New Orleans Pacific Railway Company into the Texas and Pacific Railway Company that the Texas and Pacific Railway Company, under its own chartered name and organization should, without impairing any existing right, exercise in addition thereto, all the powers, rights, privileges and franchises and own and control all the properties that the New Orleans Pacific Railway Company then exercised and owned, or by its charter and by-laws it had the right to exercise, own or control."

Thereafter, on July 11, 1882, the City Council adopted Ordinance No. 7946, as follows:

"An ordinance supplementary to Ordinances 6695, 6732 and 6938, Administration Series, granting certain rights to the New Orleans Pacific Railway Company and its assigns, and providing for the selection of a site for the Claiborne market.

"Whereas, by section 2, of Ordinance 6695, Administration Series, a right was given to the New Orleans Pacific Railway Company, or its assigns, to locate, construct and maintain an extension of its railroad through Claiborne street, with a right to construct a passenger depot on the neutral ground of Claiborne street, at or near the intersection of Claiborne street with Canal street, with a proviso that should it become necessary for the building of the depot or laying tracks to remove the Claiborne market, then the New Orleans Pacific Railway Company, or its assigns, should rebuild the same at their own expense on such lots as the city shall designate; and

"Whereas, by Ordinances Nos. 6732 and 6938, Administration Series, certain rights have also been granted to said company and its assigns with reference to the said Claiborne street and to Thalia street, and the company has built its road from Baton Rouge to New Orleans, crossing Thalia street, and established its terminus in the city limits at Thalia street and the levee, and is preparing also to cross from Westwego to the City Park, and thence to Claiborne street; now, therefore,

"SECTION 1. Be it ordained by the Council of the City of New Orleans, That the Administrator of Improvements, the Administrator of Commerce, and the Administrator of Waterworks and Public Buildings, be, and they are hereby, authorized and directed, within sixty days from the passage of this ordinance, to select such lots as may be needful and proper for a new site for said market; and when such selection shall have been made they shall deposit a proces-verbal thereof in the office of the Administrator of Waterworks and Public Buildings.

"SEC. 2. Be it further ordained, That whenever said company or its assigns shall find it necessary to remove said building it shall be rebuilt on said lots so selected and as prescribed in said original ordinance.

"SEC. 3. Be it further ordained, That in crossing the new canal under its charter, and according to the said ordinances, the said railway company, or its assigns, shall do so by means of a proper drawbridge."

Statement of the Case.

The company also sent its officers with certain city officers in the summer of 1882 to inspect lots thought suitable at that time for the Claiborne market, when the removal of the market might be decided upon; and stated by its officers that the lots would be purchased, the market taken down and another market put up, but that if this was not satisfactory to the city, the city should remain silent for a while, because if it were known the railroad wanted the lots, too much would be asked for them. In the summer of 1883, the company demanded from the city surveyor lines and levels for a track on the river front from Louisiana avenue to Jackson street, and the city surveyor not furnishing them, instituted suit June 11, 1883, in the civil district court for the Parish of Orleans, where the same is still pending, to compel the city surveyor by writ of mandamus to furnish such lines and levels. The company also paid $1000 rent for the two years ending March 8, 1882, and 1883, under an alleged lease of the batture in front of the Upper City Park and made a tender of $500 for rent under said alleged lease for the year ending March, 1884; and acquired by private ownership four squares of ground adjoining the Upper City Park, two squares fronting the river and two in the rear thereof.

The record showed that the railroad company did not establish its terminus in the rear of the city of New Orleans at the place designated by Ordinance 6695 of November 9, 1880, and referred to in Ordinance 6732 of December 3, 1880; that the company did not as stated or required in Ordinance 6938 of March 29, 1881, make its terminus on the west bank of the Mississippi River at Westwego, and there erect its wharves, inclines and structures, necessary for the purpose of crossing the river at that point so as to reach the east bank on the batture in front of the City Park; and that the company did not build its road from the batture along the edge of the park through the designated streets to the point in the rear of the city where the proposed terminus was to be located, under and in accordance with the provisions of the city ordinances, which have already been stated. And the record also disclosed that instead of making Westwego its terminus on

the west bank of the river, the railroad was prolonged nine miles further down the bank of the river to a point designated as Gouldsboro; and this latter point being approximately opposite the foot of Thalia street on the east bank of the river, wharves and inclines were constructed at Gouldsboro, whence the traffic of the road was carried across the river to the foot of Thalia street in the City of New Orleans, where depots and structures have been established by the company.

On the 15th of April, 1884, the City Council adopted an ordinance, No. 685, Council Series, as follows:

"An ordinance repealing certain sections of the Ordinance No. 6938, A. S., granting privileges to the New Orleans Pacific Railway Company.

"Be it ordained, That sec. two (2) of the Ordinance No. 6938, A. S., passed March, 1881, granting to the New Orleans Pacific Railway Company a lease of the Upper City Park batture property, be, and the same is, hereby repealed and revoked."

June 16, 1886, the City Council adopted an ordinance, No. 1828, Council Series, as follows:

"An ordinance repealing certain rights granted to the New Orleans Pacific Railway Company under Ordinance 6695, A. S., adopted November 9, 1880; No. 6732, A. S., adopted December 3, 1880; No. 6938, adopted March 29, 1881; No. 7946, adopted July 11, 1882; and

"Whereas the city of New Orleans granted to the Pacific Railway Company the right to extend its tracks through Claiborne street to Canal, to erect a passenger depot on Claiborne street near Canal street, construct tracks from Claiborne street to and through Thalia street to the river; and

"Whereas the original grantee company has merged its identity with that of an alien corporation, which itself is now in the hands of a receiver appointed on the prayer of an alien corporation; and

"Whereas such rights were granted on various conditions which have not been complied with, and the delay for so doing has elapsed; and

"Whereas by the acts of said New Orleans Pacific Railway

Company such rights have been abandoned, and it is necessary for the public good that Claiborne street, between Common street and the Old Basin, shall be used for steam and horse railway and depot purposes:

"Therefore, be it ordained by the Council of the City of New Orleans, That all rights of way on Claiborne street, rights to establish a passenger depot on said street, and rights to connect any steam or other railway by the New Orleans Pacific Railway Company through or on Claiborne street, or to erect any depot thereon, whether acquired through or by the ordinances above enumerated or through or by any other ordinance of the council of the city of New Orleans, be and the same are hereby repealed and revoked."

July 2, 1886, the receivers of the Texas and Pacific Railway Company, and the Fidelity Insurance Trust and Safe Deposit Company, filed a bill of complaint in the Circuit Court of the United States for the Eastern District of Louisiana, which alleged the incorporation of the Texas and Pacific Railway Company under certain acts of Congress, the acquisition by the Texas and Pacific Railway Company of all the property and franchises of the New Orleans and Pacific Railway Company, the appointment of receivers of the Texas and Pacific Railway Company, the adoption by the city of New Orleans of Ordinance No. 6695, on November 9, 1880; of Ordinance No. 6732, on December 3, 1880; of Ordinance No. 6938, on March 29, 1881; the full and fair compliance by said New Orleans and Pacific Railway Company and the Texas and Pacific Railway Company with the conditions imposed by said ordinances; the adoption of Ordinance No. 7946; the repealing ordinances, No. 685, Council Series, adopted April 24, 1884, and No. 1828, Council Series, adopted June 8, 1886; the violation by the adoption of said ordinances of the contract created by Ordinances Nos. 6695, 6732 and 6938, Administration Series, and prayed that Ordinances No. 685 and No. 1828, Council Series, be adjudged and decreed to be illegal and injurious to complainants, and be cancelled, and the right of the Texas and Pacific Railway Company, under Ordinance No. 6695, to lay its tracks and build a passenger depot on the

neutral ground of Claiborne street, near Canal street, and to remove the Claiborne market, be declared and decreed, and its right to the lands of said park batture, under the second section of Ordinance No. 6938, be declared and decreed; and its right to have lines furnished by the proper official of the city for its route from Louisiana avenue to Jackson street, along the river front, under the third section of said ordinance, be declared and decreed and specifically enforced.

That the city of New Orleans be enjoined and restrained from in anywise executing Ordinance No. 685 and Ordinance No. 1828, Council Series, and from granting to any other person or corporation the rights sought to be taken away by said Ordinances Nos. 685 and 1828.

The city of New Orleans filed its answer, November 1, 1886, which admitted the incorporation of the Texas and Pacific Railway Company; the incorporation of the New Orleans Pacific Railway Company; the contract entered into between the New Orleans Pacific Railway Company and the Texas and Pacific Railway Company, averring, however, the effect of said contract to be that the Texas and Pacific Railway Company was held and bound to all the obligations imposed upon the New Orleans Pacific Railway Company, and was affected by all the equities existing between the New Orleans Pacific Railway Company and the city of New Orleans; the appointment of the receivers; the adoption of Ordinance No. 6695, on the 9th of November, 1880; Ordinance No. 6732, on December 3, 1880; Ordinance No. 6938, on March 29, 1881; the failure on the part of complainants to comply with the obligations imposed by said ordinances; the nullity of the lease of the batture in front of the Upper City Park, purported to be granted by Ordinance No. 6938, and the nullity of the grant of the right to build a depot on the neutral ground of Claiborne street, said batture in front of said park and said neutral ground being dedicated to public use; and the legality of the repealing Ordinances 685 and 1828, Council Series.

On the 3d of February, 1887, complainants filed a supplemental bill, which alleged that under the ordinance set forth in the original bill of complaint, the wharf of the Texas and

Counsel for Parties.

Pacific Railway Company, its transfers and incline between Thalia and Terpsichore streets, at New Orleans, had been duly constructed and used for about five years, and in like manner and during the same time the tracks of said railway, connecting its transfer facilities and its depots and sheds at its Thalia street terminus, had been laid and used in Pilie and Water streets, and along the river front from Thalia street up to about Race street; that it had become necessary for the business of said railway to lay a small spur track to connect said wharf above the transfer slip with the said tracks on Pilie and Water streets; that the complainants had applied to the city surveyor for lines and levels of said spur track; that the city surveyor refused to grant said lines and levels under a certain resolution of the council of September 15, 1885, prohibiting him from giving any lines for such work in the street without submitting the question to the council; that said resolution was illegal and a breach of complainants' contract, and that interference by the mayor of the city with complainants' building said spur track was apprehended.

Upon these allegations a writ of injunction was prayed for, restraining the city from interfering with complainants in the work of building said spur track to connect the wharf above the transfer incline between Thalia and Terpsichore streets with the tracks of the railway between Thalia and Water streets, along the river front, and in the work of strengthening and filling up said wharf and driving piling to reach the same with said spur, and for a decree as prayed for in their original bill.

Upon this supplemental bill a restraining order was granted which, by agreement, was to stand as an injunction pending suit.

On the 23d day of June, 1891, a final decree in favor of complainants, granting in full the prayer of their bill, was rendered.

From this decree the city of New Orleans appealed.

Mr. Samuel L. Gilmore for appellant.

Mr. W. W. Howe for appellee. *Mr. John F. Dillon* was on his brief.

Opinion of the Court.

MR. CHIEF JUSTICE FULLER, after stating the case, delivered the opinion of the court.

The assignments of error relate to three subjects: First, the batture or space in front of the City Park, embraced in the lease made by the city to the railroad company in execution of the terms of the city ordinance; second, the construction of a track on Claiborne and Canal, and the building on Claiborne near Canal of a passenger depot; and, lastly, the wharfage rights claimed by the railroad company at the foot of Thalia street in virtue of section 4 of Ordinance No. 6938.

The argument as to the first and second assignments is, that the right granted to the railroad company by Ordinances 6695, 6732 and 6938, to extend its track from the point designated as its terminus, in the rear of the city along Claiborne to Canal, and there to build a passenger depot, as also the lease, which, to carry out the ordinance, empowered the railroad company to use the batture in front of the park, and to construct its railroad along the edge thereof through certain designated streets to the rear of the city, were all granted to the railroad company as accessory rights, depending for their existence upon the crossing at Westwego and the location by the railroad company of its terminus in the rear of the city. In other words, that these rights were given to the railroad company, subject to conditions precedent, or to use the language of the law of Louisiana, subject to suspensive conditions. It is further contended: First, that in consequence of the failure of the railroad company to cross at Westwego and to locate its terminus as aforesaid, and its election, on the contrary, to continue its road down the river to Gouldsboro and there cross the river, it never acquired the right to enjoy the privileges above mentioned, and hence that the repealing ordinances are valid. Second, that even if the rights in favor of the company above mentioned were not granted to it on a suspensive condition, they were clearly subject to a resolutory or dissolving condition, arising from the obligation to cross at Westwego and to locate the terminus in the rear of the city at the point designated in the original

ordinance, the contention being that the failure to do so within the period named in the ordinance authorized the city to treat the contract as dissolved and pass the repealing ordinances in question. The railroad company meets these propositions by denying that crossing at Westwego and the location of the terminus in the rear of the city, at the point named in the original ordinance, was made a condition suspending the operation of the grant of the rights above stated, and argues that even if it be conceded that the location of the terminus at the point originally pointed out created a condition, it was not a suspensive but a resolutory one. Although it is admitted that the happening of a resolutory condition dissolves the contract, yet such consequences, it is asserted, do not arise from the mere happening of the condition, and cannot be availed of by one of the contracting parties of his own will, since before the resolutory condition can be invoked it must be established by a suit brought that such condition has arisen and that the effect of its existence has been to dissolve the contract. That is, the claim is that under the law of Louisiana a dissolving or resolutory condition does not operate upon the contract *proprio vigore*, but requires the judgment or decree of a court to give it effect, and that before finding a contract dissolved in consequence of a resolutory condition, the court has the power to obviate the effect of the condition by giving further time to perform the act from which the condition is claimed to have arisen, if, in its judgment, the equities of the case so require.

The question which first arises is, was the right of the railroad company to the property in front of the park and to the track on Claiborne street, including the construction of a passenger depot on Claiborne near Canal, subject to suspensive conditions. The Louisiana Civil Code provides as follows:

"ART. 2021. Conditional obligations are such as are made to depend on an uncertain event. If the obligation is not to take effect until the event happen, it is a suspensive condition; if the obligation takes effect immediately, but is liable to be defeated when the event happens, it is then a resolutory condition.

"ART. 2022. Conditions, whether suspensive or resolutory, are either casual, potestative or mixed."

"ART. 2024. The potestative condition is that which makes the execution of the agreement depend on an event which it is in the power of the one or the other of the contracting parties to bring about or to hinder."

In defining the suspensive condition the Louisiana Code says:

"ART. 2043. The obligation contracted on a suspensive condition, is that which depends, either on a future and uncertain event, or on an event which has actually taken place, without its being yet known to the parties."

These provisions of the Louisiana Code are like those of the Code Napoleon on the same subject. Articles 1168, 1170, 1181.

In *Cornell* v. *Hope Insurance Company*, 3 Martin, N. S. 223, 226, the Supreme Court of Louisiana said, in respect of conditions precedent:

"They are recognized and provided for by our system of jurisprudence, and by every other that has in view the ordinary transactions of men. The obligation is conditional, when it depends on a future or uncertain event, says our Code. The event then must be shown to make the obligation binding on the party against whom it is presented. For until it takes place, he is not bound to perform what he has promised. C. Code, 272, Art. 68. There is an exception to this rule in regard to the dissolving condition. But in relation to all others it is true, and it is a matter of no moment whether we say the obligation is suspended until the condition is performed — or that the performance of the condition must precede the execution of the obligation. C. Code, 274, Art. 81 and 3; Toullier, Droit Civil Francaise, liv. 3, tit. 3, chap. 4, No. 472; Pothier, Traité des Ob., No. 202."

"The effect of a suspensive condition, as its name necessarily implies, is to suspend the obligation until the condition is accomplished or considered as accomplished; till then nothing is due; there is only an expectation that what is undertaken will be due; *pendente conditione nondum debetur sed spes est debitum iri.*" (Pothier, Traité des Ob., 218.)

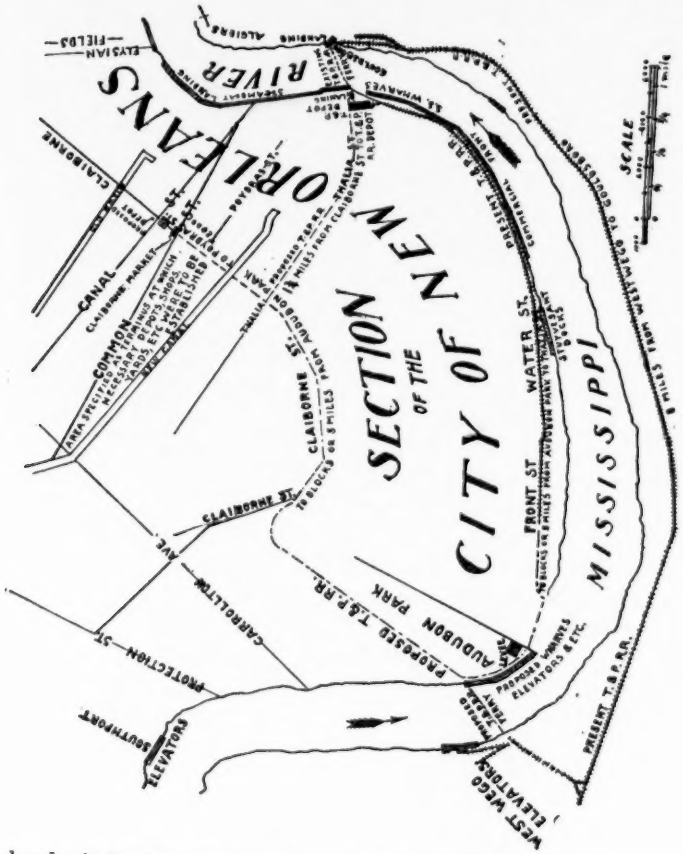
The suspensive condition under the Louisiana Code is the equivalent of the condition precedent at common law.

The general principles in respect of conditions precedent are set forth sufficiently for the purposes of this case by Chief Justice Shaw in *Mill Dam Foundry* v. *Hovey*, 21 Pick. 440, cited by appellant. Where the undertaking on one side is in terms a condition to the stipulation on the other, that is, where the contract provides for the performance of some act, or the happening of some event, and the obligations of the contract are made to depend on such performance or happening, the conditions are conditions precedent. The reason and sense of the contemplated transaction, as it must have been understood by the parties and is to be collected from the whole contract, determine whether this is so or not; or it may be determined from the nature of the acts to be done and the order in which they must necessarily precede and follow each other in the progress of performance. But when the act of one is not necessary to the act of the other, though it would be convenient, useful or beneficial, yet, as the want of it does not prevent performance, and the loss and inconvenience can be compensated in damages, performance of the one is not a condition precedent to performance by the other. The non-performance on one side must go to the entire substance of the contract and to the whole consideration, so that it may safely be inferred as the intent and just construction of the contract that if the act to be performed on the one side is not done, there is no consideration for the stipulations on the other side. See *Cutter* v. *Powell*, 2 Smith's Leading Cases, 17, and notes.

In examining the contract embodied in the ordinances it is essential to have in mind the particular territory to which the ordinances relate, and we, therefore, insert on page 335 an outline sketch extracted from a map of the city of New Orleans contained in the record.

The original Ordinance 6695 contemplated that the proposed railroad would be built upon the west bank of the Mississippi River, New Orleans being upon the east bank, and that the road would cross that river to the east bank some

hundred or more miles above New Orleans, coming to that city on the east bank, and entering in the rear of the city, that is, in that portion of the city lying a considerable distance back from the river. The purpose of the ordinance was



clearly indicated by its title, which declared that it was intended to grant "to the New Orleans Pacific Railway Company or its assigns the right to establish its terminus within the city limits and to construct, maintain and operate a railroad

to and from such a terminus, with one extension for passenger purposes and another for freight purposes, into and through certain streets and places in the city of New Orleans." The preamble to the ordinance recited the desire of the railroad to enter the city at about a certain point, and to construct its terminus between the New Canal and Melpomene street, providing the city would grant the right to extend its tracks "*from such terminus* into and through Claiborne street to Canal street for passenger purposes; and shall also grant the right to extend its tracks *from such terminus* north of Claiborne Canal by the most convenient and practicable route through the public streets to the river front for freight purposes." The first section of the ordinance grants the railroad the right to enter the city to the point stated in the preamble, and to construct and maintain at the terminus necessary depots, shops, yards, warehouses and other structures, convenient and useful for the transaction of its business. The point at which the right to construct this terminus was given by the ordinance is embraced within the triangular space in the rear of the city as marked on the sketch above given. The second section of the ordinance empowered the company to "locate, construct and maintain *an extension of* its railroad with all necessary tracks, switches, turnouts, sidings and structures of every kind, convenient and useful and appurtenant to said railroad, . . . into and through Claiborne street to Canal street, with the right to construct a passenger depot at or near the intersection of Claiborne street with Canal street." A glance at the sketch will make clear the fact that Claiborne street thus designated was in the rear of the city, quite near the point where the railroad had contracted to establish its terminus, depots and structures, and that the route thus mapped out in the very nature of things and in the language of the ordinance was a mere right granted to the railroad to *extend* its tracks from the terminus, which the railroad was under the obligation to build, to and along the designated route to the point indicated on Claiborne and Canal. The third section of the ordinance obligated the city to designate a street from the point where the terminus

was selected, and where the company was to establish itself, through which it could build an extension for the purposes of its freight business to the river front. On the face of this ordinance it is apparent that the rights thus given the railroad to extend along Claiborne to Canal for passenger purposes, and along a street to be designated to the river for freight purposes, were mere accessories to the obligation imposed by the ordinance upon the railroad to build its depots, structures, warehouses, etc., at the point indicated, and that the incidental rights of extension from the terminus to the other points could have no existence, if no terminus was established from which the extensions could be made. Reading the provisions of the ordinance with the preamble and the title, it cannot reasonably be controverted that the rights of extension were granted upon the suspensive condition that the railroad should terminate at the point indicated, and there build the shops and depots from which the right to extend its tracks was conceded. And this is, if possible, made more certain by considering the fourth section, which, in express words, provides that the privileges of extension granted were dependent upon the establishment of the terminus at the point indicated, and would cease to exist if, after the establishment of the terminus, the railroad company should abandon it. The language of the fourth section is as follows:

"That the right of way, franchises and privileges herein granted to the New Orleans Pacific Railway Company are granted only on condition and in consideration that the said grantees shall permanently establish the terminus of said road within the city limits, and maintain said terminus during the existence of the charter of said company, for which period said right of way and privileges shall last; and should the said company at any time hereafter abandon its said road on the east side of the Mississippi River and its terminus within the city limits, then this grant shall cease and terminate, and be without force or effect from the date of such abandonment; . . . and it is still made a condition of this grant that said railway company shall complete its road from the crossing of the Mississippi River, at or near Baton Rouge, to

its terminus in this city within two years from the promulgation of this ordinance."

The words "the terminus of said road" and "said terminus" used in this fourth section, clearly refer to the terminus fixed by the ordinance, and where the railroad agreed to establish its shops, roundhouses, etc. It follows, then, that the ordinance granted a right to the railroad company to enter the city to reach a designated point, and imposed upon the company the obligation to erect its depots, shops, warehouses, etc., at that point; that in consideration of this obligation assumed by the company, to be performed within two years, a right was given to it to *extend* from the depot so designated a passenger track to a given point, and a freight track to another point; that the two rights of extension were the mere resultants of the principal obligation imposed upon the company, in consideration of which the rights to the extensions were conceded; and that the ordinance, in addition, in order to remove all question that the incidental rights of extension were dependent upon the principal obligation to establish a terminus at the point named, provided that, even after the fixed terminus was established, if it were abandoned, the company should cease to enjoy the right of extension along Claiborne to Canal which the original ordinance granted. Thus there were plainly created, first, a suspensive, and, after the work was done, a resolutory condition.

Nor is there anything in Ordinance 6732, adopted on December 3, 1880, which changed the rights of the parties. That ordinance reiterated and reasserted the nature of the privilege covered by the concession made by the previous ordinance, and designated Thalia street, which is marked on the sketch, as the one through which the railroad company should build the track for freight purposes in compliance with the obligations assumed by it under the first ordinance.

This brings us to the consideration of the ordinance numbered 6938, passed in March, 1881. The purpose of that ordinance, and the change in condition which rendered its adoption necessary, is stated with great clearness in the preamble thereof:

"Whereas, the New Orleans Pacific Railway Company has purchased the road heretofore constructed under the charter of the New Orleans, Mobile and Texas Railway Company on the west bank of the Mississippi River, beyond Bayou Goula and Westwego, and with a view to maintaining and operating the said road in connection with and as a part of its through line to and from its terminus in New Orleans, designated in section 1 of Ordinance No. 6695, Administration Series, passed on the 9th day of November, 1880; such line to cross the Mississippi River from a point at or near Westwego to a point on the east bank of the river in front of the Upper City Park, late Foucher property; thence to extend by the best and most practicable route to the designated terminus between the New Canal, Claiborne canal and Carrollton avenue:

"Now, therefore, for the purpose of securing to the city of New Orleans, the advantages that will result from locating and permanently maintaining the terminus of the New Orleans Pacific Railway within the limits of the city of New Orleans, as herein above recited."

The ordinance then proceeds in section one to authorize the railroad to maintain wharves, inclines, etc., on the river front at the Upper City Park from such point on the river front "as its crossings" from Westwego shall be located at, and from this point to build a track along the western border of said City Park, and from thence by the best and most practicable route to "its *designated terminus* east of Carrollton avenue." The second section grants to the railroad land in front of the City Park belonging to the city, on the borders of the river, for the purpose of establishing the crossing of the road as recited in the first section. The third section gives the company the right to lay certain tracks down the river front, in other words, to connect the newly authorized tracks with those existing at or near Thalia street. The fourth section granted the company the right to make certain structures at the foot of Thalia street, the point to which the extended freight track referred to in the previous ordinances was to terminate, and at which, as we shall hereafter see, the company actually made its crossing from the west bank, and

where it now maintains its terminal facilities. The rights covered by this section are those to which the third assignment of error relates and are not involved in the inquiry now being pursued. The fifth section authorized the mayor of the city to enter into a contract of lease with the railroad for the piece of ground in front of the City Park referred to in the ordinance, and the sixth section declared that the grant referred to was made upon the condition of the establishment of "its terminus within the city limits."

Referring to the sketch, and considering the record and the terms of this ordinance, the situation was this: The railroad company having obtained a concession from the city of a right to enter the city on the east bank in a particular direction and to build its terminus at a point designated, and having received authority, if it did the foregoing things, to make certain extensions, found it necessary, in consequence of its change of route, to obtain a further consent from the city. The change of line was this: Instead of building its road on the west bank to a point one hundred or more miles above New Orleans, and there crossing the river and coming thence into the city in the rear thereof, as designated in the original ordinance, the company having bought a road on the west bank, the terminus of which was Westwego, about opposite the City Park, asked and was allowed that it be exempted from reaching its designated terminus by entering the city in the rear thereof, and that it be granted the right to establish a crossing from Westwego to the land in front of the City Park, so that from the land thus conceded the railroad might reach the point where it had contracted that it would make its permanent establishment. The argument that this ordinance gave the railroad the power to establish a new or different terminus from that referred to in the original ordinance, because the place where the terminus was to be is referred to indefinitely in the ordinance as between the New Canal, Claiborne canal and Carrollton avenue, is untenable. Indeed the ordinance contains not a word relieving the railroad from the obligation to establish and maintain the terminus indicated in the previous ordinances. On the contrary, the preamble de-

clares that the new route was granted to the railroad to enable it to reach "the designated terminus between the Claiborne canal and Carrollton avenue," which is the situation originally described. It further recites that it is passed for the purpose of enabling the railroad to locate and permanently maintain "the terminus . . . within the limits of the city of New Orleans, *as hereinabove* recited."

In stating the purpose of the grant of the new right of way from the point of landing at the City Park opposite Westwego along the line of the park over the route indicated, the first section in the ordinance declares it to be given to afford the railroad the "most practicable route to its designated terminus east of Carrollton avenue." True it is that in section six, in referring to the previous obligations of the company to establish its terminus, the words used are that the grantee shall permanently establish "its terminus within the city limits." But, manifestly, the words "its terminus" as used there refer to its terminus as defined not only in the ordinance in question but in the prior ordinances by which the grant was made.

It being shown by the record that the terminus from which the extension along Claiborne street to Canal was to be made was never constructed, and that the crossing from Westwego to the land in front of the park was also never established, but, on the contrary, that the company extended its road down the river to Gouldsboro where it made its main crossing, it needs no reasoning to demonstrate that the right to the extension down Claiborne street and the right to the use of the batture in front of the City Park no longer obtains. The claim of the corporation really amounts to this: That, having had certain accessory rights conferred upon it in the event it discharged particular obligations, it can disregard the obligations, escape the burdens resulting therefrom, and yet hold on to all the rights which depended for their existence upon the performance of the obligations which the company has disregarded. The ordinances cannot be properly construed as authorizing an extended track to be built when the point from which the extension was to be made has never come into existence. They cannot be read as dedicating to the use of the

railroad, under the terms of the ordinances, the land in front of the City Park, when such use was accorded to the railroad solely to enable it to accomplish a purpose which it has declined to effectuate by carrying its main crossing to another and a far distant point. In reaching these conclusions we are not unmindful of the argument predicated on the supposed effect of ordinance numbered 7946 A. S. The title of this ordinance indicates its purpose. It is as follows:

"An ordinance supplementary to ordinances 6695, 6732 and 6938, Administration Series, granting certain rights to the New Orleans Pacific Railway Company and its assigns, and providing for the selection of a site for the Claiborne market."

The preamble of this ordinance recites the two ordinances conferring the right to build the extension on Claiborne street and states this right to be one of maintaining "an extension of its railroad through Claiborne street," and after reciting the fact that the railroad had crossed at Thalia street, and established its terminus there, declares that the railroad is preparing also to cross from Westwego to the City Park, and thence to Claiborne street. The ordinance then proceeds to provide for arrangements for removing the market from Claiborne street in order to allow the extension on that street to be built. The argument which is based upon this ordinance is this, that, as at the time this ordinance was passed, the railroad had crossed from Gouldsboro to Thalia street and established its terminus there, as is recited in the ordinance, hence it is asserted the ordinance recognizes the fact that the railroad was entitled to the extension on Claiborne street despite the fact that it had not established its terminus as required by the ordinances from which the right to the extension on Claiborne street arose. But this overlooks the fact that in the very sentence upon which reliance is placed reference is made to the ordinance giving the corporation the right to build from the City Park to the "designated" terminus. One portion of the sentence cannot be separated from the other. The most that can be said of the argument advanced, from the text of this ordinance, is that it seeks by implication and remote deduction to absolve the company from the obligation imposed

upon it when the accessory right of extension down Claiborne street was granted, and thus to enable the company to retain the incidental right, when it had relieved itself of the obligation upon which the right rested. It is not to be doubted that the rule is that contracts are not to be so violently construed as to destroy rights in consequence of suspensive conditions, but it is also equally obvious that they are not to be so interpreted as to relieve one of the parties to a contract from the obligations resulting therefrom and thereby destroy the suspensive condition plainly written therein. Corporations do not take public grants and privileges by implication, and where express and positive obligations are imposed in making a grant, these obligations cannot without violating an elementary canon of interpretation be frittered away in consequence of loose implications made by way of reference in subsequent municipal ordinances. The formal contract of lease executed by the city of the batture in front of the City Park took its origin from and was sanctioned by the ordinance granting the right to cross the river from Westwego to the land covered by the lease in order to enable the corporation to carry its tracks from thence to the terminus which it contracted to establish under the original ordinance. It follows, therefore, that the suspensive condition by which the rights of the company under the original ordinance were held in abeyance operates also upon the lease in question.

The mere payment of rent did not change the nature of the suspensive condition or work an estoppel. The right to use the property was limited to the destination stated in the contract. (La. Civil Code, 2711.) But this right to use was covered by the suspensive condition, and the contract of lease only evidenced the agreement to use the property for the purposes stated, when the suspensive condition ceased to operate by the discharge of the obligations on which it rested, that is, the establishment of the terminus at Westwego, the crossing therefrom, and the location of the shops, etc., at the place fixed in the original ordinance. The case is aptly illustrated by *Roy De L'Ecluse et autres*, Cour de Cassation, 4 Jan. 1858; Journal du Palais, 1858, 452. There a promise to sell on a sus-

pensive condition was entered into, but the prospective buyer was allowed to take possession pending the condition. The claim was that this fact destroyed the suspensive nature of the condition. But the court held to the contrary, considering that the fact of possession was subject to the suspensive condition, as it was upon such condition that the contract had been entered into. Laurent, vol. 17, No. 33, p. 53.

Concluding that the rights on Claiborne street and to the batture in front of the park were subject to suspensive conditions, it is manifest from the facts which we have stated that the railroad company was not entitled to possess or enjoy the same. This renders it unnecessary to consider the resolutory condition and leaves only for consideration the subject-matter of the third assignment of errors. This asserts that the rights conveyed by the fourth section of Ordinance No. 6938 to wharfage, etc., at Thalia street are not validly held by the corporation. This is based not on the claim of a condition either suspensive or resolutory, but because it is asserted that the grant was *ultra vires*. The repealing ordinances, however, do not embrace this grant, and except for the argument at bar it does not appear that the city has repudiated the grant. Since this case was argued a suggestion has been made that this grant has been, in effect, ratified by a provision of a new constitution said to have been recently adopted by the State of Louisiana. As we must reverse the decree rendered for the reasons above stated, we deem that the ends of justice will best be subserved by not passing on this assignment, thus leaving the rights of both parties in relation thereto open for further consideration in the court below.

Decree reversed and cause remanded for further proceedings consistent with this opinion.